The Property of
Mr. Z. Randall

The Second PART
OF
Modern Reports:
BEING A
COLLECTION
Of ſeveral
SPECIAL CASES,
Moſt of them ADJUDGED in the
COURT
OF
Common-Pleas,
In the 26th, 27th, 28th, 29th, and 30th Years
Of the REIGN of
King Charles II.
When Sir *Fra. North* was Chief Juſtice of the ſaid Court.

To which are added,
Several Select CASES in the Courts of *Chancery*, *Kings-Bench*, and *Exchequer*, in the ſaid Years.

Carefully Collected by a Learned Hand.

The Second Edition.

In the *SAVOY*:
Printed by **John Nutt**, Aſſignee of *Edward Sayer* Eſq; for **Charles Harper**, at the *Flower-de-Luce* over-againſt St. *Dunſtan's* Church in *Fleet-ſtreet*, MDCCIX.
1709

TO THE

RIGHT HONOURABLE

JOHN

Lord SOMERS,

Baron of *Eveſham*, Lord High Chancellor

OF

ENGLAND.

My Lord,

WHEN both the Favour and Severity of the Laws were by partial and unuſual Methods applied to the Perſons, and not to the Caſes of the Accuſed; when the Life and Honour of an unfortunate Man depended on the Arbitrary Dictates of ſome Men in Authority; and when the Sentence pronounced was more Criminal than the Offence of which the Party was too eaſily convicted; then was your Lordſhip as far from any Advancement to a judicial Office, as your Judgment and Inclinations were from the Approbation of ſuch Proceedings: But no ſooner were Places of Honour and Profit in the Law made the unſought Rewards of good and learned Men, but your Lordſhip's Merits entituled you to both; whoſe Moderation and Temper will make your Adminiſtration juſt and eaſy in that honoura-

ble Court, to which Fortune had no Share in your Promotion; and whoſe natural Abilities are ſo improved by a continued and inflexible Study, that your Knowledge is not alone confined to the municipal Laws of this Nation, but is generally extenſive to all humane Learning.

What Services may not a Prince expect from the Wiſdom and Vigilancy of ſuch a Counſellor? And what Benefit may not a divided People find by your equal Diſpenſation of Juſtice, who, if they can be united in any Thing, it muſt be in the general Satisfaction which all have in your Promotion, becauſe they know thoſe Cauſes which come before your Lordſhip will receive a due Hearing and Attention without Paſſion or Prejudice to Perſons; ſuch Emotions being as much beneath the Greatneſs of your Lordſhip's Mind, as they are beyond the Duty of Juſtice, and fit only for ſuch who will neither be guided by the Rules of Equity or Reaſon; ſo true is that Saying, Utitur animi motu qui uti ratione non poteſt.

The Reſpect which is due to the Office of Magiſtrates, challengeth an univerſal Obedience; but that particular Affection and Eſteem which we have for their Perſons, is due only to their Vertues and Merits; And ſuch is that which I have, and all Men, eſpecially thoſe of my Profeſſion, ought to have for your Lordſhip and the preſent Judges in Weſtminſter-Hall, *whoſe Learning and Integrity in judicial Determinations may bring the Laws nearer to Perfection; and whoſe Examples are the juſt Commendation of the preſent, and I hope will be the Imitation of ſucceeding Ages.*

I could never underſtand the right Meaning of that Sentence, Boni Judicis eſt ampliare Juriſdictionem; *for if that be true, then to what Purpoſe were thoſe Arguments at the Bar of the Houſe of Peers againſt*

ſome

ſome late Judges for retaining Bills in Equity, the ſubject Matter whereof was only tryable at the Common Law? Such Complaints are now no more, becauſe your Lordſhip will not only ſupport the Honour and Dignity of that Court wherein you preſide in the Beauty of Order, but will not enjoyn any other from exerciſing its proper Juriſdiction.

Thus will the Credit of the Laws of England *be revived, and Men will acquieſce under the legal Determinations of each Court; very few Writs of Error will be brought for Error in Law, becauſe of the Juſtice and Stability of the Judgment in that Court wherein it was given; and very few Appeals, becauſe your Lordſhip knows ſo well how to temper Equity with Juſtice, that he muſt be a very angry Man, who goes away diſſatisfied with your Lordſhip's Decree.*

But ſince the Actions of Men in great Places are ſubject to the various Cenſures of Mankind, if any prejudiced Perſon ſhould revive thoſe Diſputes, or quarrel at your Lordſhip's Adminiſtration, ſuch Complaints would leave no other Impreſſion upon the Minds of impartial Men, than to convince them of the Wrong done to your Lordſhip, and the Folly of ſuch Miſapprehenſions.

My Lord, *I have prefixed your Lordſhip's Name to this mean Performance, taking this Occaſion to ſhew that great Honour and Reſpect which I have for your Lordſhip; not that I am ſo vain to think any Thing herein to be worthy of your Lordſhip's Leiſure, neither do I think it Manners to beg your Lordſhip's Patronage, becauſe a good Book will protect it ſelf at all Times, and a bad One deſerves no Protection.*

I know few Books are either praiſed or peruſed, but what are warranted by the common Repute and Eſteem

of the Writer, which muſt be imputed to the Prejudice and Partiality of Men, and which argues a Diffidence of our natural Parts, as if we did not dare to make a right Uſe of our own Judgments: For this Reaſon I have concealed my Name, that a Judgment may not be made of the Book by the Repute of the Writer. But I hope your Lordſhip will not condemn my Ambition, when I ſay, I am not altogether unknown to your Lordſhip, who am

Your Lordſhip's

Middle-Temple,
June 22. 1693.

Moſt humble Servant,

J. W.

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DE
Termino Sancti Hill.

Annis 26 & 27 Car. II. in Communi Banco.

Coram *Franciſco North* Milite, *Capital Juſtic'.*
Hugone Wyndham Milite,
Roberto Atkins Milite, & } *Juſtic'.*
Willielmo Ellis Milite,

The King *verſus* the Biſhop of *Rocheſter* and Sir *Francis Clark.*

Quare Impedit.

Mod. Rep. 195. Grant of the King where the firſt Clauſe is certain, and a Miſtake in another, yet the Grant is good.

IN a Quare Impedit a ſpecial Verdict was found, wherein the Caſe was thus:

The Manor of Laburn, to which the Advowſon of the Church of Laburn was appendant, did by the Diſſolution of Monaſteries, Anno * 31 H. 8. come to the King, who granted the ſaid Manor to the Archbiſhop of Canterbury (excepting the Advowſon) and afterwards the ſaid Archbiſhop regrants the ſame to King H. 8. and the Advowſon of the Church of Laburn aforeſaid; and then King H. 8. grants the ſaid Manor of Laburn & Advocation' Eccleſiæ de Laburn dicto Archiepiſcopo, (having named him before) dudum ſpectan', and which was regranted to the ſaid King by the ſaid Archbiſhop, and lately belonging to the Abbot of G. &c. adeo plene as the ſaid Archbiſhop or Abbot had it, or as it was in our Hands by any Ways or Means howſoever.

* 31 H. 8. c. 13.

And whether the Advowſon paſſed by this laſt Grant, was the Queſtion.

Three Juſtice (abſente North) gave Judgment for the Defendant, that the Advowſon did paſs by this Grant.

Justice Ellis in his Argument said, That it was plain that when the Manor came to H. 8. the Advowson was appendant; but when it was granted to the Archbishop, and the Advowson excepted, it then became in gross, and therefore could never afterward be appendant: As an Acre once disunited from the Manor can never after be Part of that Manor, Liford's Case, 7 Co.

James *and* Johnson's *Case* Postea.

And 'tis as plain, that before the Statute de Prerogativa Regis, cap. 15. That in the Case of the King, by the Grant of a Manor, the Advowson though not named passed, much more if it be named in any Part of the Deed, as if it be in the Habendum though not in the Premisses; but that must be intended of an Advowson appendant.

10 Co. 63.

And though Advowsons are excepted by that Statute, yet in case of Restitution, an Advowson will pass by the Words Adeo plene & integre, though not named.

* 10 Co. 63. Postea. Attorney General *against* Turner.

In this Case there are general Words, and the same as in * Whistler's Case; yet this differs from that, for here 'tis granted Adeo plene, as the Abbot had it; by those Words it doth not pass, for then it was appendant, but now it is in gross; and if the King intended to pass an Advowson as appendant when 'tis in gross, the Grant is void, Hob. 303.

In Whistler's Case there are the Words Adeo plene, as in this, and the Advowson was appendant still; but yet there are general Words here that will pass it: *Adeo plene* as the Archbishop had it, will not serve, because he never had it; neither will *Adeo plene* as the Abbot had it pass this Advowson, because he had it in gross; but *Adeo plene* as the King had it by any Ways or Means whatsoever, those general Words are sufficient to pass it.

The King grants the Manor and the Advowson of the Church of Laburn, which is certain, and by particular Name, Part of what follows (as *spectan'* to the Archbishop) is false; for it never belonged to him, because it was excepted in the Grant of the Manor to him, but the first Description being full and certain, the Falsity of the other shall not avoid the Grant, especially when the King is not deceived in his Title nor in the Value, and when there is a Certainty of the Thing granted.

Some false Suggestions may make his Grant void, as if he grant the Manor of D. reciting that it came to him by Attainder, when it came by Purchase, Hob. 229.

Lane 11.

But if the Mis-recital concerns not the King's Title or Profit, it doth not vitiate the Grant, 10 H. 2. 4. Sir John Lestrange's Case, where the King by Office found had the Wardship of a Manor, and makes a Grant thereof, reciting Quod quidem Manerium in manus

manus noſtras ſeiſit' &c. which was not true, yet the Grant was held good, becauſe it was only to make that certain which was certain enough before by a particular Deſcription. So in Legate's Caſe, 10 Co. 113. wherein is cited the Caſe of the Earl of Rutland and Markham, to whom the Queen had granted the Office of Parkerſhip, &c. quod quidem Officium the late Earl of *Rutland* habuit, when in truth the Earl never had it before, yet the Grant was held good.

So alſo if he grants for and in Conſideration of Service done, or Mony paid; if falſe, it avoids not the Grant, becauſe ſuch Conſiderations (when paſt) are not material whether they are true or falſe, Cro. Jac. 34.

If the King let the Manor of D. of the Value of 4 l. per Annum, if it be more it is ill; but if he let it by a particular Name, and then adds, Quod quidem Manerium is of ſuch a Value, 'tis good, becauſe the * Quod quidem is but the Addition of another Certainty: So here the Advowſon is granted by ſpecial and expreſs Name, but the Clauſe that follows, Dudum ſpectan' to the Archbiſhop, implies a Miſtake; and had there been no more in the Caſe, this Falſity would never have avoided the Grant. * 2 Cro. 34.

But when the King had enumerated ſeveral Ways by which he thought he might be intitled, at laſt as a Proof that he was reſolved to paſs it, he adds theſe Words, viz. as it is in our Hands by any Way or Means whatſoever.

Atkins Juſtice of the ſame Opinion: Where the Thing is not granted by an expreſs Name, there, if a Falſity is in the Deſcription of that Thing, the Grant is void even in the Caſe of a common Perſon, as if he grant Lands lately let to D. in ſuch a Pariſh, and the Lands were not let to D. and were alſo in another Pariſh, the Grant is void, becauſe the Lands are not particularly named, Anderſ. 148. Heywood's Caſe.

A fortiori in the Caſe of the King, as if he grant omnia illa Tenementa ſituata in Wells, when in truth the Lands did not lie there; for this Reaſon the Grant was void, becauſe it was general, and yet reſtrained to a particular Town, and the Pronoun (illa) goes through the whole Sentence.

But if a Thing is granted by an expreſs Name, though there is a Falſity in the Deſcription, yet in the Caſe of a common Perſon 'tis good.

As when the Subchantor and Vicars Choral of Lichfield made a Grant to Humfrey Peto of 78 Acres of Glebe, and of their Tythes Predial and Perſonal, and alſo of the Tythe of the Glebe, All which late were in the Occupation of Margaret Peto,

which was not true, yet the Grant was adjudged good; for the Words All which are not Words of Restriction, unless when the Clause is general and the Sentence entire, but not when it is distinct, Cro. Car. 548.

But in the Case of the King, if there is a Falsity by which the King hath a Prejudice, and a Falsity upon the Suggestion of the Party, it will make the Grant void, but every Falsity will not avoid his Grant if it be not to his Prejudice.

But let the Falsity in this Case be what it will, the *Adeo plene* as it is in our Hands helps it; and though it hath been objected, That these Words will not help the Grant, because nothing new is granted, that being done before; 'tis true, there is nothing new granted, but that which was before was not well granted till this Clause came, which supplies and amends the Falsity; for now 'tis apparent that the King intended to pass the Advowson as well as the Manor, and therefore at last grants it, be his Title what it will.

In all Cases where the King's Grant is void because of any Mistake in his Title, 'tis to be intended the King would not make the Grant unless the Title were so as 'tis recited, but here 'tis apparent the King resolved to grant it.

Judgment. Wyndham Justice agreed, and Judgment was given accordingly.

Wilcox *versus the Servant of Sir* Fuller Skipwith.

Replevin. IN Replevin, the Defendant justifies the taking of the Cattle

Justification for an Herriot. for a Herriot, which he alledges to be due upon every Alienation without Notice.

The Plaintiff denies the Herriot to be due upon Alienation. And thereupon Issue is joined.

The Special Verdict finds the Tenure to be by Fealty and the Rent of 3 s. 1 d. (though the Defendant in his Avowry had alledged the Rent to be 12 s. 4 d. and the Plaintiff in his Barr to the Avowry had confessed it to be so) Suit of Court and an Herriot, which was payable upon every Alienation with or without Notice.

And whether upon this Special Verdict, Judgment should be given for the Plaintiff or the Avowant, was the Doubt.

Ex parte Def. Upon the Point of Pleading, Serjeant Jones for the Defendant said, it had been objected that the said Avowry was ill, for ut Ballivus, &c. bene cogn' captionem in prædicto loco, &c. but doth not say tempore quo, &c. for a Herriot (tempore quo, &c. being

ing left out) and ſo doth not ſay a Herriot was due at the Time of the taking of the Goods.

But he anſwered, That that was uſual and common, and of that Opinion were all the Juſtices, and ſo it was held good.

It was farther objected, That here is a Variance between the Avowry and the Finding in the Special Verdict; The Avowant ſays that the Rent was 12 s. and 4 d. and the Jury find that it was but 3 s. and 1 d. He alſo ſaith, that the Herriot was due upon every Alienation without Notice, and they find it due with or without Notice.

But to that he ſaid, the Jury have doubted only of the laſt Point, for the Avowry was not for Rent, but for the Herriot; ſo the Subſtance is, whether he had good Cauſe to diſtrein for the Herriot or not. Poſtea

And as to that, the Subſtance is ſufficiently found, like the Caſe in Dyer 115. Debt upon Bond for Performance of Covenants, and not to do Waſte, the Breach aſſigned was that the Defendant felled twenty Oakes, who pleads Non ſuccidit viginti quercus præd' nec earum aliquam, the Jury find he cut down ten, yet the Plaintiff recovered; for though the intire Allegation of the Breach was not found, becauſe ten did not prove the Iſſue of twenty literally, yet the Subſtance is found, which is ſufficient to make the Bond forfeited.

So in Treſpaſs, where the Plaintiff makes a Title under a Leaſe which commenced on Lady-day, Habendum à Feſto, &c. and the Iſſue was non demiſit modo & forma, the Jury found the Leaſe to be made upon Lady-day, Habendum à confectione, and ſo it commenced upon Lady-day, and not à Feſto, &c. which muſt be the Day after the Feaſt, yet 'twas adjudged for the Plaintiff, becauſe the *Subſtance was, whether or no the Plaintiff had a Leaſe to intitle himſelf to commence an Action. Hob. 73. * Moor 868. Yelv. 148.

But in Ejectment or Replevin ſuch a Declaration had been naught, becauſe therein you are to recover the Term, and therefore the Title muſt be truly ſet out, and in Replevin you are to have a Retorn' habend', but in Treſpaſs 'tis only by way of Excuſe. Sed quære.

A Second Reaſon is, becauſe both Plaintiff and Defendant in Pleading have agreed the Matter in this Particular, for both ſay the Rent was 12 s. and 4 d.

'Tis a Rule in Law, That what the Parties have agreed in Pleading ſhall be admitted though the Jury find otherwiſe, 2 Aſſ. pl. 17. 18 E. 3. 13 b. 2 Co. 4. Goddard's Caſe. Jurors are not bound by Eſtoppel ad dicend' veritatem, for they are ſworn ſo to do, unleſs the Eſtoppel be within the ſame Record, but here that

that which is confeſſed cannot be Matter of Iſſue, not being Lis conteſtata.

It has been objected, That in 33 H. 6. 4. b. the Plaintiff brought Debt for 20 l. the Jury found the Defendant only owed 10 l. and the Plaintiff could never recover.

But that muſt be intended of a Debt due upon Contract, and there the leaſt Variance will be fatal, 38 H. 6 1.

As to the Second Variance, 'tis not material, for 'tis not true as the Avowant hath ſaid, for if the Matter in Iſſue be found, the Finding over is but Surpluſage; both the Verdict and the Avowry agree, that the Defendant may take a Diſtreſs in caſe of Alienation without Notice: And ſo he prayed Judgment for the Defendant.

Judgment for the Defendant.

The Court were all of Opinion, that Judgment ſhould be given for the Defendant; for what is agreed in Pleading, though the Jury find contrary, the Court is not to regard; and here the Subſtance of the Iſſue, as to the Second Point, is well found for the Defendant.

Judge Atkins told Serjeant Wilmot, who argued for the Plaintiff, that he had cited many Caſes which came not up to the Matter, and ſo did magno conatu nugas agere, for which Reaſon I have not reported his Argument.

Smith *verſus* Feverel.

Caſe for ſurcharging a Common.

THE Plaintiff brought an Action on the Caſe againſt the Defendant, ſetting forth, That he had Right of Common in A. and that the Defendant put in his Cattle, viz. Horſes, Cows, Hogs, &c. ita quod Communiam in tam amplo modo habere non potuit.

The Defendant pleads a Licence from the Lord of the Soil to put in Averia ſua, which was agreed to comprehend Hogs as well as other Cattle in the moſt general Senſe.

The Plaintiff demurs, and after Argument the Court were all of Opinion, that Judgment ſhould be given for the Plaintiff, becauſe the Defendant in his Plea hath not alledged that there was ſufficient Common left for the Commoners, for the Lord cannot let out to Paſture ſo much as not to leave Sufficient for the Commoners.

And though it was objected, That the Plaintiff might have replyed ſpecially, and ſhewn there was not enough; yet it was agreed by the Court that in this Caſe he need not, becauſe his Declaration

claration to that Purpose was full enough, and that being the very Gist of the Action, the Defendant should have pleaded it.

It was held indeed, that in an Action upon the Case by the Commoner against the Lord, he must particularly shew the Surcharge; but if the Action be brought against a Stranger, such a shewing as is here is sufficient.

North Chief Justice said, and it was admitted, that the Licence being general, ad ponend' averia, it should be intended only of Commonable Cattle, and not of Hogs; Sed contra, if the Licence had been for a particular Time.

Anonymus.

A Man devises Land to A. his Heir at Law, and devises other Lands to B. in Fee, and saith, If A. molest B. by Suit or otherwise he shall lose what is devised to him, and it shall go to B. The Devisor dies, A. enters into the Lands devised to B. and claims it; the Court were of Opinion, that this Entry and Claim is a sufficient Breach to entitle B. to the Land of A. Devise.

It was also agreed, that these Words, If *A.* molest *B.* by Suit, &c. make a Limitation and not a Condition, Pl. Com. 420. the Devise being to the Heir at Law; for if it were a Condition, it descends to him and so 'tis void, because he cannot enter for the Breach, 3 Co. 22. Cro. Eliz. 204. Wellock and Hamond's Case. Paying in the Case of the eldest Son makes a Limitation, Owen 112.

So in the Case of Williams and Fry in an Ejectione firmæ in B. R. lately for Newport-House. A. deviseth to his Grand-daughter, Provided and upon Condition that she marry with the Consent of the Earl of *Mancheſter* and her Grandmother, 'tis a Limitation.

2dly, It was agreed, That an Entry and Claim in this Case was a sufficient Molestation; for when the Heir enters and claims generally, it shall be intended as Heir, and the Words, that he shall not molest by Suit or otherwise, are to be intended occasione Præmissorum.

3dly, There is no need of Entry to avoid an Estate in case of a Limitation, because thereby the Estate is determined without Entry or Claim, and the Law casts it upon the Party to whom it is limited, and in whom it vests till he disagrees to it.

A. devises Land to B. and his Heirs, and dies, 'tis in the Devisee immediately, but indeed till Entry he cannot bring a possessory Action, as Trespass, &c. Pl. Com. 412, 413. 10 Co. 40. b. where

Nota. where a Poſſeſſion veſts without Entry, a Reverſion will veſt without Claim.

Curtis *verſus* Davenant.

Prohibition. A Biſhop cannot appoint Commiſſioners to tax the Pariſh for Building or Repairing a Church.

IN a Prohibition, the Queſtion was, Whether if a Church be out of Repair, or being ſo much out of Order that it muſt be re-edified, whether the Biſhop of the Dioceſs may direct a Commiſſion to impower Commiſſioners to tax and rate every Pariſhioner for the re-edifying thereof? The Court did unanimouſly agree ſuch Commiſſions were againſt Law, and therefore granted a Prohibition to the Spiritual Court, to ſtop a Suit there commenced againſt ſome of the Pariſhioners of White-Chapel, for not paying the Tax according to their Proportions.

It was agreed, That the Spiritual Court hath Power to compel the Pariſh to repair the Church by their Eccleſiaſtical Cenſures; but they cannot appoint what Sums are to be paid for that Purpoſe, becauſe the Church-wardens by the Conſent of the Pariſh are to ſettle that.

As if a Bridge be out of Repair, the Juſtices of Peace cannot ſet Rates upon the Perſons that are to repair it, but they muſt conſent to it themſelves.

Theſe Pariſhioners here who contribute to the Charge of repairing the Church may be ſpared, but as for thoſe who are obſtinate and refuſe to do it, the Spiritual Court may proceed to Excommunication againſt them; but there may be a Libel to pay the Rates ſet by the Church-wardens.

Nurſe *verſus* Yearworth *in Cancellaria.*

Bill *in Cancellaria* for the Aſſignment of a Term.

RIchard Yearworth being ſeiſed of Lands in Fee, makes a Leaſe to the Defendant Chriſtopher Yearworth for 99 Years to ſuch Uſe as by his laſt Will he ſhould direct.

Afterward he makes his Will in Writing (having then no Iſſue but his Wife groſſement enſeint) and thereby deviſes the ſame Land to the Heirs of his Body on the Body of his Wife begotten, and for want of ſuch Iſſue, to the ſaid Chriſtopher the Defendant and his Heirs.

Richard dies, and about a Month after a Son is born, the Son by Vertue of this Deviſe enjoys the Land, but when he attains his full Age of One and twenty Years, he ſuffers a Common Recovery, and afterwards deviſes the Land to the Complainant Nurſe, and dies.

The

The Complainant exhibits a Bill against the Defendant to have the Lease for 99 Years assigned to him, and whether he should have it assigned or not, was the Question.

1. It was pretended, That an Estate in Fee being limited by the Will to Christopher, who was Lessee for 99 Years, the Term is thereby drowned.

2. It was objected, That the Devise by Richard to the Infant in ventre sa mere was void, and then the Complainant, who claimed by a Devise from the Posthumus, could have no Title, but that the Defendant to whom an Estate was limited by the Will of Richard in Remainder should take presently.

But notwithstanding what was objected, the Lord Keeper Finch decreed, That the Lease which was in Trust, should be assigned to the Complainant Nurse.

He said, That at the Common Law without all question a Devise to an Infant in ventre sa mere of Lands devisable by Custom was good, so that the Doubt arises upon the Statute of H. 8. which enacts, That it shall be lawful for a Man by his Will in Writing to devise his Lands to any Person or Persons, for in this Case the Devisee not being in rerum naturâ, in Strictness of Speech is no Person, and therefore it hath been taken that such a Devise is void, Moor's Rep. and 'tis left as a Quære in the Lord Dyer 304. Roll. Abr. tit. Devise 609. lit. H. pl. 2. Godb. 385. 11 H.6. 13. 7 Co.37. a. dubitatur

But in Two Cases in the Common-Pleas, one in the Time when the Lord Chief Justice Hale was Judge there, the other in the Lord Chief Justice Bridgman's Time, it hath been resolved, That if there were sufficient and apt Words to describe the Infant, though in ventre sa mere, the Devise might be good.

But in the King's-Bench the Judges since have been divided upon this Point, that as the Law stands now adjudged, this Devise in our Case seems not to be good: But should the Case come now in question, he said he was not sure that the Law would be so adjudged; for 'tis hard to disinherit an Heir for want of apt Words to describe him; and 'tis all the Reason in the World, that a Man's Intent, lying in extremis, when most commonly he is destitute of Council, should be favoured.

Whitrong *versus* Blaney.

Proceſs into *Wales.*

THIS Term the Court delivered their Opinions in this Caſe, North Chief Juſtice, who had heard no Arguments herein, being abſent.

The Caſe was this: The Plaintiff upon a Judgment in this Court ſues out a Scire Facias againſt the Heir and the Tertenants, which was directed to a Sheriff of Wales; the Defendant is returned Tertenant, but he comes in and pleads Non tenure generally, and traverſes the Return; the Plaintiff demurs.

Two Points were ſpoken to in the Caſe.

1. Whether the Defendant can traverſe the Sheriff's Return? And all the Three Juſtices agreed that he cannot.

2. Whether a Scir' Fac', Ca' Sa', Fi' Fa', &c. would lie into Wales on a Judgment here at Weſtminſter; And they agreed it would well lie.

An Indictment may be removed. 2 Cro. 484.

Ellis Juſtice agreed, If Judgment be given in Wales it could not be removed into the Chancery by Certiorari, and ſent hither by Mittimus, and then Execution taken out upon that Judgment here, becauſe ſuch Judgments are to be executed in their proper Juriſdictions, and ſuch was the Reſolution of the Juſtices and Barons, Cro. Car. 34.

But on a Judgment obtained here, Execution may go into Wales. No Execution can go into the Iſle of Man, becauſe 'tis no Part of England, but Wales is united to England by the Statute of 27 H. 8. c. 26. And therefore in Bedo and Piper's Caſe, 2 Bulſtr. 156. it was held, that ſuch a * Writ of Execution goes legally into Wales.

* Het. 20. 2 Cro. 484. The Opinion of *Doderidge.* Roll. 395. 2 Sand. 194. *Twiſden* denied it.

He ſaid, he had a Report of a Caſe in 11 Car. 2. where a Motion was made to quaſh an Elegit into Wales; but it was denied, for the Court agreed the Writ well iſſued.

Some have made a Difference between the King's-Bench and the Common-Pleas, as if an Execution might go into Wales upon a Judgment obtained in the King's-Bench, but aliter if in the Common-Pleas.

But the Law is the ſame in both Courts, Mich. 1653. between Wyn and Griffith, this very Caſe came in queſtion, and there it was held, that Execution goes into Wales as well as into any Part of England upon a Judgment in the Courts of Weſtminſter.

In

In 2 Bulstr. 54. Hall *versus* Rotheram, it was held that a Ca' sa' shall go into Wales against the Bail upon a Judgment recovered in the King's-Bench here against the Principal.

Of the same Opinion was Justice Atkins, and that the Defendant cannot averr against the Sheriff's Return, nor a Bishop's Certificate; and the true Reason is given by my Lord Coke in 2 Inst. 452. for the Sheriff is but an Officer, and hath no Day in Court to justifie his Return.

In special Cases, Exception may be made to the Sheriff's Return; but this is by reason of the special Provision that is made for the doing of it by the Statute of W. 2. cap. 39. as in case Two small Issues be returned, or that the Sheriff return a Rescous, the Party in his Averment must alledge of what Value the Issues are.

2dly. That notwithstanding the common Saying, Breve Domini Regis non currit in Walliam, yet a Fi' Fa', Ca' Sa', or any Execution whatsoever, may issue into Wales upon a Judgment obtained here: And to prove this, he considered,

1. How Wales formerly stood in relation to England.
2. How it stood before it was united by the Statute of H. 8.
3. How it now stands since the Union.

1. And as to the First of these, England and Wales were once but one Nation, they used the same Language, Laws and Religion, and so continued 'till the Time of the Roman Conquest, before which they were both comprehended under one Name, viz. The Isle of Great Britain.

But when the Romans came, those Britains, who would not submit to their Yoke, betook themselves to such Places where they thought themselves most secure, which were the Mountains in Wales, and from whence they came again; soon after the Romans were drove away by their Dissentions here, and then these Britains enjoyed their ancient Rights, as before.

After this came the Saxons and gave them another Disturbance, and then the Kingdom was divided into an Heptarchy; and then also, and not 'till then, began the Welsh to be distinguished from the English; but yet at that Time they had great Possessions in England, *viz.* Glocester, part of Worcester, Hereford, Shrewsbury, which they kept 'till King Offa drove them out of the plain Countries, and made them fly for Shelter into those Mountainous Parts in Wales, where they now continue, Cambden 15. And 'tis observable, that though Wales had Kings and Princes, yet the King of England had Superiority over them, for to him they were Homagers, Camb.

den 67. The Word Princeps implying a Subordinate Dignity, Selden's Titles of Honor 593.

2dly. During the Time of the Separation, Wales had distinct Laws and Customs from those in England, whence that Saying took its Effect, viz. Breve Domini Regis non currit in William; yet the Parliament of England before that Time made Laws to bind Wales; as the Act of 25 Edw. 1. for Confirmation of the old great Charter of the Liberties of England and of the Forests, which enacts, That certain Duties shall be paid for every Sack of Wool, &c. exported out of Wales, 2 Inst. 531.

So the Statute 3 Edw. 1. cap. 17. which gives Remedy if a Distress be taken and detained in a Castle, and upon Deliverance demanded by the Sheriff, if the Lord of the Castle should refuse, he might raise the Posse Comitatus, and beat down the Castle; and if such Detainer or Refusal be in the Marches of Wales, the King, as the Statute saith, is Sovereign Lord of all, and shall do Right upon Complaint; and the Conquest was not made till 9 E 1. so that at that Time likewise, though Wales had Princes of its own, yet the Kings of England were Sovereigns to those Princes; and though they had Laws of their own, yet were they bound by those that were made here; and though their Princes had ordinary Remedial Writs, yet in Cases extraordinary the King's Writs here run into Wales; and it was not for want of Power, but because there was no Need, for that it went so seldom; and when the King's Writ did issue, it was necessary to direct it to the Sheriff of an English County, for Wales was not then divided into Shires; but afterwards by the Act called Statutum Walliæ, 12 Edw. 1. * it was divided into Six Counties, and then again by the Act of 27 H. 8. cap. 26. it was divided into the other Six Counties.

Vaugh. 400.

* 2 Inst. 195. 4 Inst. 239.

But during this Time there were frequent Hostilities between England and Wales, until by the Conquest in Edw. 1's Time they were united.

'Tis pretended, that H. 3. Father to Edw. 1. was the Conqueror, and 'tis probable something considerable might be done in his Time; yet the absolute Conquest of the whole Dominion was made by Edw. 1. in whose Time the aforesaid Statutum Walliæ was made, and after that the Statute of 27 H. 8. to compleat the Union, the End of which is declared to bring the Subjects of both to an entire Unity; and that it may be done with Effect, 'tis enacted, That the Laws of England be executed there; for which Reason it is held in 5 Co. Rep. Vaughan's Case, fol 49. that the Statutes of Jeofails do extend to Wales; and

Vaugh. 414, 415.

2 Bulst. 54.

in

in 2 Bulſtr. 156. * the Sheriff of Radnor upon a Scire Fac' directed to him, returned Breve Domini Regis non currit, &c. and was amerced 10 l. for his falſe Return, Vide 19 H. 6. 20. Fitzherb. Trial pl. 40. tit. Juriſdiction, 13 Ed. 3. 23, 24, 34. idem Brief 621. & Aſſize 382.

* This was a Reſolution upon no Debate.

It was objected, That by expreſs Proviſion in 1 E. 6. cap. 10. Exigent and Proclamations ſhall be awarded out of the Courts of Weſtminſter into Wales, which if they might before, this Law was then needleſs.

'Tis true, the Opinion of the Parliament ſeems to be, that had it not been for this particular Proviſion, ſuch Proclamations might not have iſſued; for by 6 H. 8. cap. 4. ſuch Proclamations went but to the next County, but they do not declare ſo, and perhaps they might ground themſelves upon that vulgar Error, Breve Domini Regis non currit in William, which is not true unleſs the Clauſe be limited to original Writs only. Vaugh. 414.

Objection. That the Statute of 5 El. cap. 23. which enacts, That the Excommunicato Capiendo ſhall be returned in the Kings-Bench, and takes notice that this Writ is not returnable into that Court from Wales, and therefore orders that the Significavit ſhall be ſent by Mittimus out of the Chancery to the Chief Juſtice there, and gives them Power to make Proceſs to inferior Officers returnable before them at their Seſſions for the due Execution of this Writ; all which had been in vain, if the Capias might go into Wales before the making this Act.

Anſw. But that is an original Writ, and ſo comes not up to this Caſe.

Wyndham Juſtice agreed in omnibus, and ſaid, That the Statute of 1 Ed. 6. was very needful; for if a Man ſhould be outlawed, if the Proceſs ſhould be ſent to the Sheriff of the next adjoining County in England, he could not have any Notice that he was outlawed, and ſo could not tell when outlawed, or at whoſe Suit.

Vaughan late Lord Chief Juſtice, held ſtrongly, That no Execution would go into Wales when this Caſe was argued before him; and of the ſame Opinion was Juſtice Twiſden. Vaugh. 395. 2 Saund. 194.

Williamſon

Williamson *versus* Hancock.

Collateral Warranty.

A Special Verdict was found in an Ejectment, where the Case was:

Mod. Rep. 192.

Richard Lock the Father was Tenant for Life, with Remainder in Tail to Richard his Son, Remainder to the right Heirs of the Father, who levies a Fine with Warranty to the Use of Susan and Hannah Prinn in Fee; they by Bargain and Sale convey their Estate to the Defendant: The Son in his Father's Life-time, before the Warranty attached, comes of full Age; the Father dies; the Question was, Whether the Son's Entry was barred by this collateral Warranty thus discended?

And the Three Justices, absente North Chief Justice, were clear of Opinion, that the collateral Warranty was a Barr to the Son, and so Judgment was given for the Defendant.

Ellis Justice held, that his Entry is taken away; for in every Warranty Two Things are implied, a Voucher and Rebutter; he that comes in by Voucher calleth the Person into Court, who is bound in the Warranty to defend his Right, or yield him other Land in Recompence, and must come in by Privity; but if a Man have the Estate, though he comes in the Post he may rebutt, that is, he may repel the Action of the Heir by the Warranty of his Ancestor, without shewing how the Estate came to him, Fitzh. Nat. Br. 135.

In a Formedon in the Discender to say the Ancestor enfeoffed J. S. with Warranty, without shewing how J. S. came by the Estate, is good.

Object. It was objected by Serjeant Maynard, That no Person can take Advantage of a Warranty, who comes in by way of Use, as in this Case.

Answ. But 'tis expressly resolved otherwise in Lincoln College Case, 3 Co. 62. b. and the Prinn's in this Case came in by Limitation and Act of the Party, and the Defendant who hath the Reversion likewise by Limitation of Use, though he be in the Post, shall take Benefit of the Warranty as Assignee within the Statute of 32 H. 8. c. 34. and so it was resolved in Fowl and Doble's Case in this Court, that he who comes in by way of Use may rebutt; and Justice Jones in his Report, fol 199. affirms the Fourth Resolution in Lincoln College Case to be Law.

Mod. Rep. 181.

It

It was formerly objected by the Lord Chief Justice Vaughan, that this Warranty goes only to the Heirs, not to the Assigns, and here the Estate was conveyed by the Two Prinns before the Warranty attached.

Answ. But when the Estate passeth, the Warranty and Covenant followeth, and the Assignee shall have the Benefit thereof though not named, and so is the Authority of 38 E. 3. 26. if a Warranty be made to a Man and his Heirs, the Assignee, though not named, shall rebutt, but he cannot vouch.

So if A. enfeoff B. with Warranty, and B. enfeoff C. without Deed, C. shall vouch A. as Assignee of the Land of B. for the Warranty cannot be assigned.

In this Case, though the Warranty did not attach before the Estate in the Land was transferred, yet if it attach afterwards 'tis well enough, and he who hath the Possession shall rebutt the Demandant without shewing how he came by the Possession.

If a Warranty be to one and his Heirs without the Word Assigns, the Assignee indeed cannot vouch, but he may * rebutt; for Rebutter is so incident to a Warranty, that a Condition not to rebutt is void in Law: But 'tis otherwise of a Condition not to vouch, for in such Case you may rebutt. * 1 Inst. 265: a. 384.

'Tis true, it hath been an Opinion, that he who claimeth above the Warranty, if it be not attached, cannot take Benefit of it by Way of Voucher or Rebutter; as if Tenant in Dower maketh a Feoffment to a Villain with Warranty, and the Lord entreth upon him before the Descent of the Warranty, the Villain can never take Advantage of this Warranty by way of Rebutter, because the Lord's Title is paramount the Warranty, and he cometh not under his Estate to whom the Warranty was made.

If Land be given to Two Brothers in Fee, with Warranty to the Eldest and his Heirs, the Eldest dies without Issue, the Survivor shall not take Benefit by this Warranty for the Reason aforesaid.

But in the Case at Barr the Warranty being collateral and annexed to the Land, goeth with the Estate, and whilst that continues, the Party may vouch or rebutt; so here the Defendant, though he be only Tenant at Will, for the Estate is in the Bargainors and their Heirs (there being no Execution of it either by Livery or Enrolment) yet he may rebutt.

Justice

Justice Atkins was of the same Opinion, that by this collateral Warranty the Entry of the Lessor of the Plaintiff was taken away, for 'tis the Nature of a collateral Warranty to be a Barr; a * Right is bound by it; it extinguishes a Right, 'tis annexed to the Land, and runs with it.

* Jones Rep. 199, 200. 1 Inst. 366, 385. 25 H. 6. 63. Bro. Gar. 4.

If then a collateral Warranty be of this Nature, 'tis against all Reason, that he who is thus bound should make any Title to the Land; but 'tis very reasonable that he who comes in quasi by that Estate should defend his Title.

The Opinions of Justice Jones and Justice Crook in the Case of * Spirt and Bence has occasioned this Doubt: The Case was shortly thus: Cann being seised in Fee had Three Sons, Thomas, Francis and Henry, and devised Lands to the Two eldest in Tail, and to Henry the Meadow called Warhay (which was the Land in question) but doth not limit what Estate he should have in it; then he adds these Words, viz. Also I Will that he shall enjoy all Bargains I had of *Webb* to him and his Heirs, and for want of Heirs of his * Body, to his Son *Francis*, and that *Margaret* should have it for Life. Cann dies, the Meadow was not one of Webb's Bargains, Thomas had Issue Thomas the Lessor of the Plaintiff, Henry made a Feoffment in Fee to A. and B. to the Use of himself and his Wife, and to the Heirs of their Two Bodies, Remainder to his own right Heirs, with Warranty against all Persons, and died without Issue; the Lessor of the Plaintiff enters, being his Cousin and Heir, and of full Age when Henry died. In this Case it was held, that if it had been found that Margaret had an Estate for Life, and that Henry entred in her Life-time, that it had been then a Warranty commenced by Disseisin, and would not have bound Thomas the Reversioner. But as it was, those Two Judges held it no Barr, because the Warranty began with the Feoffment to Uses, and Henry being himself the Feoffee, it returned instantly to him, and was extinct as to the Reversion, because that was revested in him in Fee, and therefore they held he could have no Benefit either by Voucher or Rebutter, it being destroyed at the same Time it was created: But Berkly and Richardson Justices held, that quoad the Estate of Henry's Wife the Warranty had a Continuance, and the Ground of the contrary Opinion might be, because Justice Jones said, there was no such Resolution, as is mentioned to be the Fourth in Lincoln College Case; yet he affirmeth that very Resolution in his own Reports, fol 199.

* Cro. Car. 368.

* Notwithstanding the Word *Body*, he had but an Estate for Life in *Warhay*, for that Word extends to no other than *Webb*'s Bargains.

There

There is a Clause in the * Statute of Uses, difficult to be understood, by which 'tis enacted, That every *Cestuy que Use* may take such Advantage of Vouching, *&c.* as the Feoffees themselves might, so that *Cestuy que Use* have the Estate executed in him before the First Day of *May*, 1536. which was a Year after the making that Statute; so that the Clause seems to be exclusive of all others who shall come in afterwards. *27 H. 8. c. 10.

Answ. But he supposed the Intention of the Law-Makers to be, That there should be no more Conveyances to Uses: But because they presumed, that at first Men might not know of it, therefore, lest the Parties should be any ways prejudiced, they gave Liberty 'till such a Time to vouch or rebut, within which Time they might have some knowledge of the Statute, and then it was supposed they would make no more Limitations to Uses.

But though they imagined them to be left expiring, yet they revived. Since then the Parliament gave Leave to vouch or rebut, whilst they could in Reason think there would be any Conveyance to Uses, 'tis but reasonable, whilst they do continue, that the Parties should rebut, especially since most Conveyances at this Day are made to Uses.

Windham Justice accord in omnibus, and so Judgment was given as aforesaid.

Anonymus.

DOwer. The Tenant pleads, That a Lease was made by the Husband for 99 Years, before any Title of Dower did accrue, which Lease was yet in being, and shews, that the Lessor afterwards granted the Reversion to J. S. and died, and that J. S. devised to the Tenant for Life.

The Demandant replies, That the Lessor made a Feoffment in Fee, absque hoc, that the Reversion was granted prout, &c.

The Tenant Demurrs.

Newdigate Serjeant, for the Demantment, argued, That the Plea was not good, to which he took several Exceptions.

1. Except. The Tenant by his Plea confesseth, That the Demandant ought to have Judgment of the Reversion expectant upon the Lease for 99 Years, de tertia, but doth not say, parte.

2. Except. Here is the Grant of a Reversion pleaded, and 'tis not hic in Curia prolat'.

Then for the Matter, as 'tis pleaded, 'tis not good: He agreed, if Dower be brought against Lessee for Years, he may discharge himself, by pleading the Continuance of his Lease, during which Time the Demandant can have no Execution; but here the Tenant is no ways concerned in the Lease; 'tis Littleton's Case, None shall take Advantage of a Release, but he who is Party or Privy, and therefore the Lessee in this Case being Party, might have pleaded this, but the Tenant is altogether a Stranger.

Before the Statute of Glouceſter, cap. 11. If the Demandant had recovered in a real Action against the Tenant, the Termor had been bound, because, at the Common Law, no Body could falsifie the Recovery of a Freehold, but he who had a Freehold himself; this Statute prevents that Mischief, and enacts, That the Termor shall be received before Judgment, to defend the Right of his Term upon the Default of the Tenant, and though the Judgment cannot be hindred thereby, yet Execution shall be suspended during the Term; and therefore in Dyer 263. b. the Lady Arundel brought Dower against the Earl of Pembroke, who made Default, and before Judgment the Termor prays to be received upon this Statute, and pleads a Lease made by the Husband after Coverture, which was assigned to him, and that Dower de tertia parte of the Rent of this Lease, was assigned to the Demandant by the Court of Augmentations, which was afterwards confirmed by Letters Patents; that she accepted it, and concludes, That the Plea of the Tenant was by Collusion, between him and her, to make him lose his Term: And this was held ill, for the Reason given by my Lord * Hobart, That it is absurd to admit Two Persons to dispute the Interest of a Third Man.

But whether the Traverse is good or not, if the Plea is naught, Judgment ought to be given for the Demandant.

Jones Serjeant contra: The Pleading is well enough.

1. The Tenant confesseth, That the Demandant ought to have Judgment of the Reversion de tertia, which is well enough, omitting the Word [parte] because he claims a Third Part of such Tenements; and the Tenant confesses she ought to have Judgment, which is full enough, if the Words de tertia parte were wholly omitted.

2. He agreed, That whoever claims under a Deed, must shew it; but the Tenant, in this Case, did not defend himself by

* Hob. 316. Not for that Reason, but because that Court could not assign Dower, and so the Letters Patents of Confirmation could not make that good which was void before.

by any Title from the Deed, for the Substance of the Plea, which secured him, was, That a Lease of 99 Years was in being, and by his alledging the Devise of an Estate to him for Life, made by the Grantee of the Reversion, he did but allow the Demandant's Writ to be true, which mentions him as Tenant of the Freehold.

Then for the Matter of the Plea, he says it was good, and that the Tenant might well plead the Lease for Years.

By the * Statute of Merton, Damages are given in Dower, where the Husband died seised, which he did in this Case; but yet no Damages ought to be paid here, but for the third Part of the Rent, and the third Part of the Reversion, and therefore to acquit himself thereof, he may well plead, as here, for which there is a Precedent in Hern's Pleader 335. * 3 Inst. 32. b

Then he said, That the Traverse was ill, for the principal Point in the Plea which he ought to have traversed, was the Continuance of the Term; and 'tis not material who granted the Reversion, or to whom it was granted; for if there is a Lease in being, the Demandant cannot have Execution.

The Court were all of Opinion, That the Substance of the Plea was good, because there was a Privity in the Grantee, and it was for his Benefit to avoid the Demandant's Seisin, he being thereby entituled to the Rent, and he may plead this Plea to save himself from Damages given by the Statute of Merton: But as to the Traverse,

North Chief Justice, and Wyndham Justice, inclined, That the Traverse was well taken; for if a Disseisor pleads the like Plea, as here, 'tis not good, and therefore when the Tenant alledges a Grant of the Reversion, the Demandant may well traverse it.

But Justice Ellis and Atkyns were of Opinion, That the Traverse was immateral, for it was the Lease and not the Grant that was traversable.

But because it was alledged by the Demandants (who offered to refer it to the Council on the other Side) that this Lease so pleaded, was an old Mortgage, long since satisfied; it was referred accordingly.

Wilson *versus* Drake.

Prohibition.

29 C. 2. c. 35.--25. Feme Sole hath Debts due by Specialty, she marries, and dies, the Husband shall have Administration; *Quære*, whether he may make Distribution to her Kindred. * 22 & 23 Car. 2. c. 10.

A Prohibition being granted upon the late Statute for disposing of Intestates Estates: The Defendant demurred, and the Case was no more than this: Whether the Husband being Administrator of the Wife's Estate, be compellable to make Distribution amongst her Kindred or not?

This Case was argued by Serjeant Seys for the Defendant, and by Serjeant Jones for the Plaintiff.

The Circumstances of the Case were:

A Feme Sole had divers Debts owing to her by Specialty, she marries the Plaintiff and died, (the Bonds being not put in Suit during the Coverture) the Plaintiff administers, and her Brother sues to have a Distribution; and it was insisted for him, that a Consultation ought to go, because the * Statute extendeth to all Persons, and therefore the Husband, though not named, shall make Distribution, like the Statute de Donis, which only mentions some Estates Tail; but it has been held, that there are several other Estates Tail besides those particular Instances there mentioned.

The Title of this Act is general, and there is no Preamble to reduce it to Particulars; the enacting and provisional Clause speaks in Three Places of all Persons dying Intestate, within which general Words a Feme-Covert, as well as others, is contained.

Ex parte Quer.

But on the other Side it was said, That this Case is not instanced in that Act which provides only where the Husband dies Intestate.

As to what was objected, That this Act is a general Provision, and extends in all Cases of the like Nature, the Title of it also being general, For settling of Intestates Estates; to that it was said, That before the making this Act there were many Doubts in those Cases against which a Provision was thereby made, and therefore it well became the Prudence of that Parliament to take away all Scruples, and to settle those Things which were so apt to be questioned: But no Doubt was ever made before this Statute to whom Administration of the Wife's Estate should be committed; for by the Statute of 21 Ed. 3. cap 11. Power was given to the Ordinary to commit Administration to the

the best Friend of the Intestate; and therefore it has been agreed, that the * Husband, as being the best Friend of the Wife, was intituled to the † Administration.

And 'tis agreed on all Sides, that no Distribution is to be made by an Administrator; for if any Suit had been commenced in the Spiritual Court to that purpose, a Prohibition was presently granted. What Need was there to settle this Matter by Act of Parliament, which was so clear before?

And 'tis the more unlikely, that the Estates of Feme-Coverts should be intended to be disposed by this Act, when 'tis considered that all their Estates consist only in Things in Action, which the Husband might release during the Coverture (for all the Goods in Possession are by Law vested in the Husband by the Intermarriage) and therefore such inconsiderable Things may be well intended not worthy the Care and Provision of a Parliament.

Besides, the Husband and Wife are but one Person in Law, and this Act provides for the settling Intestates Estates; now the Wife cannot be said to die Intestate, when her Husband (the better Part) survives.

Before the making those Acts of 31 Ed. 3. cap. 11. and 21 H. 8. cap. 5. the Ordinary might have granted Administration to a Stranger; but now by the first of those Laws he is restrained to the next Friend, and by the other to the Widow or next of Kin; so that the Power which he had at the Common Law, and which was too often by him abused, being now restrained, Administration must be granted as prescribed by this Law, and no equitable Construction can take it from the Husband: For how can it be intended that the Parliament would take from him that Right which he had by those former Laws, and prefer the Relations of his Wife before him?

But if the Wife shall be adjudged an Intestate within this Act, then the Husband must lose all her Estate in Action, and he will be then also within the Rules of Distribution; so that he must be at all the Labour and Pains of Administration (which must be granted to him) to defend and get in the Estate, and receive no Benefit, for he must only deduct his Expences out of the Profits, and distribute the Overplus.

He is intituled to the Administration within the Statute of Edw. 3. He is also intituled to it within the Clause of the Statute of H. 8. which enacts, That 'tis to be granted to the Wife or next of Kin; and it seems very unreasonable that he should have no Profit for his Labour.

Lastly,

* 4 Co. 51. Ognel's Case; Cro. Car. 106. Johns *versus* Row.

† *Quere*, For Administration is not granted to the Husband *de jure*, the Ordinary may grant it to whom he please. See 1 Rom. Dig. 282 & cases cited there it must be granted to Husband

Lastly, A Feme-Covert can never be intended to die Intestate within the Meaning of this Act; for that Clause which directs what Bond the Ordinary shall take of the Administrator is very remarkable to this Purpose, which provides, That if it appear the Deceased made any Will, *&c.* which a Feme-Covert cannot do without her Husband's Consent, and therefore she is not a Person dying Intestate within the Intent of this Law. Curia advisare vult.

DE

DE
Termino Paſchæ,

Anno 27 Car. II. in Communi Banco.

Naylor *verſus* Sharpleſs *and others, Coroners of* Lancaſhire.

Caſe for a falſe Return. Mod. Rep. 198.

AN Action on the Caſe was brought for a Falſe Return, in which the Plaintiff ſets forth, That upon a Writ iſſuing out of this Court to the Chancellor of the Dutchy of Lancaſter, Proceſs was directed to Six Coroners being the Defendants, which was delivered to one of them, being then in the Preſence of the Party who was to be arreſted, but he did not execute it, and afterwards at the Return of the Writ they all returned Non eſt inventus.

This Action was laid in Middleſex, and upon Not-Guilty pleaded, the Cauſe came to Trial, and there was a Verdict for the Plaintiff.

Baldwyn Serjeant moved in Arreſt of Judgment.

1. Except. That the Action ought not to be laid in Middleſex, but in Lancaſhire, where the Tort was committed.

But as to that, it was anſwered by Serjeant Turner, When Two Matters, both of which are material and are laid in Two Counties, the Action may be brought in either; as if Two libel in the Admiralty for a Contract made at Land in Dorſetſhire, and for which the Plaintiff brings an Action in London againſt one of them, it has been adjudged the Action lies in either County.

2. Except. The Action will not lie againſt the Six Coroners, for the Tort was done by one alone.

As to that it was ſaid, All the Coroners are but one Officer; ſo if one Sheriff ſuffer an Eſcape, both are liable; but in this Caſe it had been ill to have brought the Action only againſt One, be-

cauſe

cause the Ground of it is the false Return, which was made by Six Coroners.

And as to the first Exception, there could be no Doubt now, since after Verdict 'tis *helped, though the Trial be in a wrong County.

* Stat. 16 & 17 Car. 2. c. 8.

But the Court said, that Statute helps a Mis-trial in the proper County, but not where the County is mistaken; and inclined likewise that this Action was well brought against the Sir for this Tort committed by one Coroner; but if it had been for not arresting the Party, in such a Case it ought to have been brought against the Coroner who was present with the Person to be arrested; for that had been a personal Tort which could not have been charged upon the rest.

Edwards *versus* Roberts.

That he did totally forbear, and doth not say *hucusque*, good.

THE Plaintiff declares, That the Defendant promised to pay him so much Money, in Consideration that he would forbear to sue him, and then he avers that he did extunc totaliter abstinere, *&c.* Upon Non Assumpsit pleaded, a Verdict was found for the Plaintiff. And it was now moved by Turner Serjeant in Arrest of Judgment.

1. Except. The Consideration intends a total Forbearance, and the Averment is, that from the making of the Promise he did totally forbear, but doth not say hucusque: Sed non allocatur, for that shall be intended. And it was the Opinion of the whole Court, that if the Consideration be (as in this Case) wholly to forbear, the Plaintiff by an Averment that from the making the Promise hucusque he did forbear, is well entituled to an Action.

A like Case was this Term, where the Consideration was as before, and the Averment was, that he forbore Seven Months; and being moved in Arrest of Judgment by Serjeant Baldwyn because 'tis not said hucusque, which implies, that after the Seven Months he did not forbear, it was notwithstanding held good, it being a reasonable Time; and the rather, because if the Action had been brought within the Seven Months, and the Plaintiff had averred, that hucusque he forbore, it had been good enough. Quære.

Reed

Reed *verſus* Hatton.

IN a ſpecial Verdict in Ejectment, the Queſtion did ariſe upon the Conſtruction of the Words in a Will; The Caſe being this: John Thatcher was ſeiſed in Fee of the Houſes in Queſtion, and did deviſe them to his Son Robert; in which Will there was this Clauſe, viz. Which Houſes I give to my Son *Robert*, upon this Condition, That he pay unto his Two Siſters Five Pounds a Year, the Firſt Payment to begin at the Firſt of the Four moſt uſual Feaſts that ſhall happen after the Death of the Teſtator, ſo as the ſaid Feaſt be a Month after his Death, with a Clauſe of Entry for Non-payment. The Teſtator dies; the Houſes are worth 16 l. per Annum; and whether Robert the Son ſhall have an Eſtate for Life only or in Fee, was the Queſtion.

Deviſe paying 5 *l. per Annum*, 'tis a Fee.

This was argued by Jones Serjeant for the Plaintiff, and by Seys Serjeant for the Defendant.

And for the Plaintiff it was ſaid, That Robert had but an Eſtate for Life: 'Tis true, in moſt Caſes the Word Paying makes a Fee, where there is no expreſs Fee limited; but the Difference is, viz. Where the Mony to be paid is a Sum in Groſs, let it be equivalent or not to the Value of the Thing deviſed, the Deviſee ſhall have a Fee, though the Eſtate be not deviſed to him and his Heirs; but if it be an Annual Payment out of the Thing deviſed, as in this Caſe, it will not create a Fee without apt Words, becauſe the Deviſee hath no Loſs; and therefore it hath been held, That if a Deviſe be made to Two Sons, to the Intent that they ſhall bear equal Share towards the Payment of 40 l. to his Wife for Life; the Sons had only an Eſtate for Life, becauſe 'tis quaſi an Annual Rent out of the Profits, and no Sum in Groſs, *Cro. Car. 157. Broke Abr. tit. Eſtate 78.

Ex parte Quer.

* Jones 211.

And * Collier's Caſe was much relied on where this very Difference was taken, and allowed that paying 25 l. in Groſs makes a Fee, but paying 50 s. per Annum creates only an Eſtate for Life.

* 6 Co. 16.

All Deviſes are intended for the Benefit of the Deviſee, and therefore where a Sum in Groſs is deviſed to be paid, which is done accordingly; in ſuch Caſe, if the Deviſee ſhould die ſoon after, the Mony would be loſt, if he ſhould have only an Eſtate for Life; but in the Caſe at Bar, the Teſtator by a nice Calculation had appointed when the Firſt Payment ſhould be made, viz.

not until a Month after his Decease, which hath prevented that Damage which otherwise might have happened to the Devisee, if no such Provision had been made, Vide Hob. 65. Green's Case.

Ex parte Def. But on the other Side it was said, That Robert had a Fee, for though here is a Sum to be paid Annually, 'tis a Sum in Gross, and Collier's Case was also relied upon on this Side.

It was agreed, where Payment is to be made, by which the Devisee can sustain no Loss, the Word Paying there will not make a Fee; but if there be any Possibility of a Loss, there it will T. Jones 106. create a Fee, which is the express Resolution in Collier's Case.

Here the Five Pounds is payable Quarterly, and the First Payment is to be made the next Quarter after the Death of the Testator, so as it be a Month after his Decease; if then he should die a Month before Christmas, the Devisee is to pay the whole Quarterly Payment at Christmas: So that if he should die the next Day after, instead of having any Benefit, he would lose by this Devise, in case it should be construed that he had an Estate only for Life.

The Court were of Opinion, that a Legacy or Devise is always intended for the Benefit of the Party; so that 'tis reasonable to make such Construction of the Will, That he may have no Possibility of a Loss. And it hath been resolved where a Devise was to A. upon Condition to pay a Sum of Money to B. and in case of Failure that B. may enter; 'tis no Condition, but an Executory * 10 Co. 36. Devise, and that * Mary Portington's Case was denied to be Law in the Resolution of Fry and Porter's Case in the King's Bench.

Judgment. And afterwards in this Term Judgment was given for the Defendant. For if there be a Devise to one upon Condition to pay a Sum of Money, if there be a Possibility of a Loss, though not very probable that the Devisee may be damnified, it shall be construed a Fee, and such Construction hath been always allowed in Wills. If A. devise 100 l. per Annum to B. paying 20 s. 'tis not likely that the Devisee should be damnified, but 'tis possible he may; and therefore the Estate in this Case being limited to Robert, and charged with Payments to the Sisters during their Lives, doth plainly prove the Intent of the Testator was, that the Devisee should have an Estate in Fee-Simple; and Judgment was given accordingly.

Bridges

Bridges *verſus* Bedingfield.

DEBT was brought upon a Bond of Award, and the Breach aſſigned was for not delivering of quiet Poſſeſſion to the Plaintiff of Seats in a Church. Arbitrament.

The Defendant craves Oyer of the Bond and Condition, which was for Performance of an Award to be made de Præmiſſis vel aliquâ Parte inde; and if there ſhould be no Award made then for the Performance of an Umpirage, and pleads that the Arbitrators made no Award de Præmiſſis, but the Umpire awarded that the Plaintiff ſhould abinde upon all Occaſions hold Two Seats quietly and peaceably in ſuch a Church, without any Diſturbance made by the Defendant; and that on the Firſt Day of November following, the Defendant ſhould deliver up the Seats to the Plaintiff, and that each ſhould bear his own Charge; and by his Plea he farther ſets forth, that the Plaintiff enjoyed the Seats prout till the 30th Day of October next following, on which Day the Seats were pulled down without his Knowledge or Conſent, per quod he could not deliver them to the Plaintiff on the ſaid Firſt Day of November. Where the Thing awarded is hindred to be done by the Act of a Stranger.

The Plaintiff demurred, and Serjeant Jones maintained the Demurrer, and ſaid, that the Pleading of nullum fecerunt Arbitrium is not good; for 'tis ſaid de Præmiſſis only, whereas it ſhould have been nec de aliqua Parte inde; for if a Bond be to perform an Award of Two Perſons or either of them, it will not be ſufficient to plead that thoſe Two Perſons made no Award, without adding nec eorum aliquis. Ex parte Quer.

But if an Award be to be made of the Manors of Dale and Sale, or either of them, and the Award is made only of Dale, 'tis well enough.

2. Except. Viz. The Umpirage is that the Plaintiff ſhould hold the Seats abinde, which is for ever; and the Defendant pleads that the Plaintiff enjoyed them till the Thirtieth Day of October.

3. Except. Viz. The Seats were to be delivered to the Plaintiff on the Firſt Day of November, and the Defendant pleads that they were pulled down before that Day without his Privity, which is not a good Plea by way of Excuſe; for being bound to deliver the Seats, he is to prevent what may hinder the Performance of the Condition.

'Tis agreed, That if a Thing be poſſible, and afterwards by the Act of *God becomes impoſſible to be done, that will be a good Excuſe; as if I promiſe to deliver a Horſe at ſuch a Day, and he dies before the Day, I am excuſed, 21 E. 4. 70. b.

* Jones 179. Win's Caſe.

So if a Scire Fac' be brought againſt the Bail, and they plead that before the Writ brought the Principal was dead; this was held not good upon Demurrer, unleſs he is alledged to be dead before the Capias awarded againſt him, Cro. Jac. 97.

But if the Action of a Stranger interpoſe, which makes the Thing impoſſible, that is no Excuſe, 22 E. 4. 27. And therefore 'tis no Plea for the Bail to ſay, that the Principal was arreſted at another Man's Suit and had to Priſon, for which Reaſon he could not render him, Cro. Eliz. 815.

So if I deliver Goods to the Defendant, and in Action of Detinue brought, he pleads they were ſtole, 'tis no good Plea; becauſe the delivery Charges him at his Peril, unleſs he undertake to keep them as his own, 4 Co. * Southcot's Caſe. So if an Eſcape be brought againſt a Gaoler, he is not excuſed by alledging that Traitors broke the Priſon, Roll. Abr. 1. Part. 808. Et ſic de ſimilibus.

* Cro. El. 815.

Ex parte Def.

Seys Serjeant, contra. As to the firſt Exception, nullum fecerunt Arbitrium de Præmiſſis is well enough, for that implies nec de aliqua inde Parte, eſpecially if the contrary is not ſhewn in the Replication, and therefore it ſhall never be intended that an Award was made of ſome Part.

2. 'Tis ſaid, he enjoyed the Seats till the Thirtieth of October, and then they were taken down, ſo not being in Rerum Natura, they could not be enjoyed longer.

3. And this is a good Excuſe for not delivering them to the Plaintiff on the Firſt Day of November, and ſo a good Performance of the Award, Co. Lit. 206. b.

If A. be bound to B. that C. ſhall marry Jane ſuch a Day, and B. the Obliger doth marry her himſelf before that Day, the Obligor is excuſed; becauſe by his Means the Condition could not be performed.

There is a Difference taken where a Man is bound to deliver Things which are in his Cuſtody, and other Things which are not in his Poſſeſſion; as in the firſt Caſe, to deliver my Horſe or Dog, for ſuch I may ſecure in my Stable from Caſualties: But in this Caſe it is expreſly ſaid in the Award, that the Property of the Seats was in the Plaintiff, and that they were fixed in the Church, ſo that he could not poſſibly ſecure them in his own Houſe, without ſubjecting himſelf to an Action;

Action; and an Award that one Man ſhall take the Goods of another, is void.

But if the Plea is not good, yet if the Umpirage be naught, Judgment is to be given for the Defendant, for the Advantage is ſaved to him upon the Demurrer.

And as to that, the Umpirage is but of one Side, for the Plaintiff is to do nothing, nor is the Defendant to be acquitted of all Suits.

To which it was anſwered by the Plaintiff's Council, That the Umpirage was of both Sides; for there being Suits depending, 'tis awarded that each ſhall bear his own Charges, which is a Benefit to the Defendant; for otherwiſe (ſeeing the Right was in the Plaintiff) the Defendant ſhould have paid the Plaintiff's Coſts as well as his own, for which he cannot now ſue without forfeiting his Bond: Curia adviſare vult.

Squibb *verſus* Hole.

Eſcape. Action of Eſcape; the Proceſs was upon Bond, not made within the Juriſdiction of an Inferiour Court, and therefore no Eſcape.

THE Plaintiff brought an Action of Eſcape, and declares, That he proſecuted one J. S. in the Court of Ely, upon a Bond made infra Juriſdictionem of that Court, upon which he was taken, and the Defendant ſuffered him to eſcape.

Upon Not Guilty pleaded, the Jury found a ſpecial Verdict to this Effect, viz. That there was ſuch a Bond, upon which there was ſuch a Proſecution, and ſuch an Eſcape as in the Declaration; but they find farther, that this Bond was not made infra Juriſdictionem Curiæ.

Maynard Serjeant, who argued for the Plaintiff, ſaid, That this Action was commenced in an Inferiour Court, upon a Bond which the Plaintiff ſets forth to be infra Juriſdictionem Curiæ; and that the Defendant was arreſted, and ſuffered to eſcape; and whether (if in truth the Bond was not made infra Juriſdictionem) an Action of Eſcape would lie, or whether all the Proceedings are coram non Judice, was the Doubt.

He took a Difference where an Inferiour Court hath an Original Juriſdiction of the Cauſe, and hath Conuſance of ſuch a Suit as is brought there; for in ſuch Caſes the Proceedings are not Extra-judicial; but if an Action is brought where properly no Action doth lie, all the Proceedings there are coram non Judice.

At

At the Common-Law, one who had a particular Juriſdiction to hold Pleas within a Liberty, could not hold any Plea of a Thing which did ariſe out of the Liberty; for though it was tranſitory in its Nature, yet being alledged not within his Juriſdiction, it was ill, 2 Inſt. 231.

But when the Cauſe of Action ariſes infra Juriſdictionem, that gives them Authority to proceed; and therefore it would be hard that the Judge and Officer ſhould be puniſhed by a Conſtruction to make all Extra-judicial, when they have no poſſible Way of finding whether in truth the Cauſe did ariſe within the *Juriſdiction of the Court or not: But the Officer is bound to obey the Proceſs of the Court, if it appear (as in this Caſe) that they had Conuſance of it; the Judge is likewiſe bound to grant the Proceſs, otherwiſe he is ſubject to the Plaintiff's Action for his Refuſal.

* Poſt. Crowder *and* Goodwin.

In ſome Caſes, The Plaintiff himſelf may not know where the Bond was made; as if he be Executor of the Obligee, &c. Beſides, in this Caſe 'tis ſet forth, That in the Action below, the Defendant pleaded non eſt factum, and ſo had admitted the Juriſdiction, or at leaſt had waved it; and it would be an inſufferable Miſchief, if after all this Labour and Charge the Defendant might avoid all again.

North Chief Juſtice ſaid, That if this Cauſe had been tried before him, he would have non ſuited the Plaintiff, becauſe he had not proved the Truth of what he laid down in his Declaration, viz. That the Bond was made infra Juriſdictionem Curiæ. But as to the Matter as it ſtood upon the ſpecial Verdict, he inclined, that as to the Plaintiff (who knew where the Bond was made) all the Proceedings were coram non Judice; but as to the Officer it was otherwiſe, for the Pleint and Proceſs would be a good Excuſe for him in an Action of falſe Impriſonment.

Judgment.

And afterwards by the Opinion of Three Judges, viz. the Chief Juſtice, Windham and Atkyns Juſtices, Judgment was given for the Defendant, That this was no Eſcape, and that though the Party had admitted the Juriſdiction, by his Plea of non eſt factum below, yet that could not give the Court any Juriſdiction, which had not any originally in the Cauſe; and the Caſe of *Richardſon *verſus* Bernard was cited as an Authority in Point, where the Plaintiff in an Action brought againſt an Officer, declared in Hull, upon a Bond made at Hallifax, and had Judgment

* Roll. Abr. tit. Eſcape, 809. pl. 45.

ment and Execution, and the Defendant eſcaped: And in an Action brought for this Eſcape, the Declaration was held ill, becauſe it did not alledge the Bond to be made infra Juriſdictionem Curiæ.

Ellis Juſtice, of a contrary Opinion in omnibus.

Sams *verſus* Dangerfield.

THE Plaintiff being Collector of the Hearth-Money, brought an Action of Debt upon a Bond againſt his Sub-Collector, conditioned to pay ſuch Sums as he ſhould receive (within 14 Days after Receipt) at ſuch a Place in the City of Worceſter, as the Plaintiff ſhould appoint. Departure.

The Defendant pleads Payment.

The Plaintiff aſſigns a Breach in Non-payment of ſuch a Sum received at a Place by him appointed.

The Defendant rejoins that the Plaintiff appointed no Place; and the Plaintiff demurr'd.

And after Argument for the Plaintiff by Jones Serjeant, this was adjudged a Departure, becauſe the Defendant ought to have pleaded firſt, That he had paid all but ſuch a Sum, for which as yet the Plaintiff had appointed no Place of Payment; and Judgment was given accordingly.

Smith *verſus* Hall.

IN an Action brought againſt the Defendant for falſe Impriſonment, he juſtified by Vertue of a Latitat, which the Plaintiff agreed in his Replication; but farther ſet forth, that after the Arreſt, and before the Return of the Writ, he tendred ſufficient Bail, which the Defendant refuſed; and Iſſue was joined upon the Tender, which was found for the Plaintiff. Falſe Impriſonment doth not lie, but an Action on the Caſe againſt the Sheriff for refuſing ſufficient Bail.

Newdigate Serjeant, moved in Arreſt of Judgment:

1. Though it was an Offence in the Defendant, who was the Sheriff's Bayliff, to refuſe good Bail when tendred, yet 'tis not an Offence within the Statute 23 H. 6. cap. 10. becauſe a Sheriff's Bayliff is not an Officer intended in that Statute, neither will this Offence make him a Treſpaſſer ab initio, becauſe

* Roll. Abr. 2 Part 561. Pl. 9.

cauſe the Taking was by lawful Proceſs, Cro. Car. 196. * Salmon *verſus* Percival.

The Defendant, as Bayliff to the Sheriff, is not the proper Officer to take Bail, but the Sheriff himſelf muſt do it, and therefore an Action on the Caſe muſt lie againſt the Bayliff, for not carrying the Party before the Sheriff, in order to put in Bail; but an Action of falſe Impriſonment will not lie.

2. The Action is laid, quare vi & armis, *&c.* in ipſum (the Plaintiff) inſultum fecit & ipſum Impriſonavit, & ut Priſonar' à tali loco ad talem locum adducebat, & detinuit contra conſuetudinem Angliæ, & ſine cauſa rationabili per ſpacium trium dierum.

The Defendant pleaded quoad venire vi & armis necnon totam tranſgreſſionem, præter the taking and detaining him Three Days, non Culp. and as to that, he pleaded the Latitat, Warrant and Arreſt, ut ſupra; but the Verdict being only againſt the Defendant upon the Second Iſſue, and nothing appearing to be done upon this, and entire Damages given; 'tis for that Reaſon ill.

North Chief Juſtice, If the Writ and Warrant were good, then the refuſing Bail is an Offence within the Statute of 23 H. 6. And as 'tis an Oppreſſion, ſo it is an Offence alſo at the Common Law; but an Action on the Caſe, and not of falſe Impriſonment, lieth againſt the Officer; for it would be very unreaſonable, by the Refuſal of Bail, to make the Arreſt tortious ab initio.

A ſpecial Action on the Caſe had therefore been the proper Remedy againſt the Sheriff, but not againſt the Officer; for an Eſcape will not lie againſt him, but it muſt be brought againſt the Sheriff.

Kren *verſus* Kirby.

Surrender by a Diſſeiſor, not good. 1 Mod. 199.

IN Ejectment, the Leſſor of the Plaintiff claimed under a Surrender made to him by William Kirby, who had an Eſtate in the Land after the Deceaſe of his Father, but entred during his Life, and thereby became a Diſſeiſor; and his Eſtate being now turned into a Right, he made the Surrender to the Leſſor of the Plaintiff; all which was found by ſpecial Verdict at the Trial; and it was adjudged that the Surrender was void.

It was pretended at the Trial, that the Father, who was Tenant for Life, had ſuffered a Common Recovery in the Lord's Court, and ſo his Eſtate was forfeited, for which the Son might enter, and then his Surrender is good.

But the Court anſwered, That without a particular Cuſtom for that Purpoſe, the ſuffering a Recovery would work no Forfeiture of the Eſtate; but if it did, 'tis the Lord and none elſe who can enter: And ſo Judgment was given for the Defendant.

Duck *verſus* Vincent.

DEBT upon Bond conditioned to perform Covenants, one of which was for Payment of ſo much Mony upon making ſuch Aſſurances. Plea to Debt upon Bond not good.

The Defendant pleaded he paid the Mony ſuch a Day, but doth not mention when the Aſſurance was made, that it might appear to the Court the Mony was immediately paid purſuant to the Condition; and for that Reaſon the Court were all of Opinion that the Plea was not good: And Judgment was given for the Plaintiff upon Demurrer.

Smith *verſus* Shelberry.

IN Aſſumpſit, the Plaintiff declared that he was poſſeſſed of a Term of 80 Years; and it was agreed between him and the Defendant, that he ſhould aſſign all his Intereſt therein to the Defendant, who proinde ſhould pay 250 l. and that he promiſed, that in Conſideration that the Plaintiff at his Requeſt had likewiſe promiſed to perform all on his Part, that he would alſo perform all on his Part; and then ſets forth, that the Defendant had paid a Guinea in Part of the ſaid 250 l. and that he, viz. the Plaintiff, obtulit ſe to aſſign the Premiſſes by Indenture to the Defendant, which was written and ſealed, and would have delivered it to him; but he refuſed, and aſſigns the Breach in Non-payment of the Mony, to which the Defendant demurred. Aſſumpſit upon a mutual Promiſe.

And it was ſaid for him by Baldwin Serjeant, That this was not a good Declaration, becauſe the Aſſignment ought to precede the Payment, and that it was not a mutual Promiſe, neither was the obtulit ſe well ſet forth; but this was a Condition precedent on the Plaintiff's Side, without the Performance where- Ex parte Def.

of no Action would lie against the Defendant, Vide 7 Co. Ughtred's Case, fol. 10. b. because it was apparent by the Plaintiff's own shewing, that the Mony was not to be paid till the Assignment made; for the Plaintiff is to assign, and the Defendant proinde, which is as much as to say, pro Assignatione, is to pay the Mony: Like the Case in Dyer 76. a. Assumpsit against the Defendant, that he promised pro 20 Marks to deliver 400 Weight of Wax to the Plaintiff, the Pronoun Pro makes the Contract Conditional.

Ex parte Quer.

Hill & Thorn Postea.

But Pemberton, Serjeant for the Plaintiff, held the Declaration good, and that it was a mutual Promise, and that the Plaintiff need not averr the Performance, for in such Cases each has Remedy against the other; and 'tis as reasonable that the Plaintiff should have his Mony before he make the Assignment, as that the Defendant should have the Term assigned before he paid the Mony: And of that Opinion was the Court, only Justice Atkins doubted.

Cond. Lutw. 252. Lib. B. 109.

Stiles Rep. 186. Postea.

Ellis Justice cited a Case adjudged in the King's Bench, which was as he thought very hard, viz. An Assignment was made between A. and B. that A should raise Soldiers, and that B. should transport them beyond Sea, and reciprocal Promises were made for the Performance (as in this Case) That A. who never raised any Soldiers, may yet bring his Action upon this Promise against B. for not transporting them; which is a far stronger Case than this at Barr.

Lutw. 253.

It was agreed here, that the Tender and Refusal (had it been well pleaded) would have amounted to, and have been equivalent with a full Performance; but the Plaintiff hath not done as much as he might, for he should have delivered the Indenture to the Defendant's Ale, and then have tendered it: But Judgment was given for the Plaintiff.

Hays *versus* Bickerstaffe.

Covenant not Conditional by the Words *Paying* and *Performing*.

IN Covenant brought by the Lessee, who declared that the Lessor covenanted with him, that he paying the Rent and performing the Covenants on his Part to be performed, shall quietly enjoy.

The Breach assigned was a Disturbance by the Lessor, who pleads, That till such a Time the Plaintiff did quietly enjoy the Thing demised without Disturbance; but then he cut down Wood, which

which was contrary to his Covenant, and then and not before he entred; and so by the Plaintiff's not performing his Covenant, the Defendant's Covenant ceases to oblige him; whereunto the Plaintiff demurred.

The Question was, Whether the Defendant's Covenant was Conditional or not? For if it amount to a Condition, then his Entry is lawful; but if it be a Covenant, 'tis otherwise, for then he ought to bring his Action.

Pemberton Serjeant for the Plaintiff. That this Covenant is not Conditional, for the Words Paying and Performing signifie no more than that he shall enjoy, &c. under the Rents and Covenants, and 'tis a Clause usually inserted in the Covenant for quiet Enjoyment: Indeed the Word Paying in some Cases may amount to a Condition; but that is where without such Construction the Party could have no Remedy. Ex parte Quer. T. Jones 206.

But here are express Covenants in the Lease, and a direct Reservation of the Rent, to which the Party concerned may have Recourse when he hath Occasion.

A Liberty to take Pot-water, paying so many Turns, &c. 'tis a Condition.

The Words Paying and Yielding make no Condition, nor was it ever known that for such Words the Lessor entred for Non-payment of Rent; and there is no Difference between these Words and the Words Paying and Performing, Bennet's Case in B. R. ruled no Condition; Duncomb's Case, Owen Rep. 54. Cook *and* Herle, Postea. Vaugh. 32.

Barrel Serjeant for the Defendant said, That the Covenant is to be taken as the Parties have agreed; and the Lessor is not to be sued if the Lessee first commit the Breach: Modus & Conventio qualifie the general Words concerning quiet Enjoyment. Ex parte Def.

The Court took Time to consider, and afterwards in this Term Judgment was given for the Plaintiff, that the Covenant was not Conditional. Sid. 266, 280.

Atkins Justice doubted.

Simpson *versus* Ellis.

Debt by a Bailiff of a Liberty.

DEBT upon Bond by the Plaintiff, who was chief Bailiff of the Liberty of Pontefract in Yorkshire, but he did not declare as Capital' Ballivus, but yet by the whole Court it was held good; for otherwise the Defendant might have craved Oyer, and have it entred in hæc verba, and then have pleaded the Statute of 23 H. 6. that it was taken *colore Officii, but now it shall be intended good upon the Demurrer to the Declaration.

* Sand. 161. Sid. 383. Latch. 143.

And Ellis Justice said, That so it was lately resolved in this Court in the Case of one Conquest. And Judgment was given for the Plaintiff.

Mason *versus* Stratton, *Executor*, &c.

Judgment kept on Foot *per Fraudem*.

DEBT upon Bond. The Defendant pleads Two Judgments had against his Testator, and sets them forth, and that he had but 40 s. Assets towards Satisfaction.

The Plaintiff replies, That the Defendant paid but so much upon the First Judgment, and so much upon the Second, and yet kept them both on Foot per Fraudem & Covinam.

2 Cro. 35. 102. Vaugh. 103, 104.

And the Defendant demurred specially.

Because the Replication is so complicated, that no distinct Issue can be taken upon it; for the Plea sets forth the Judgments severally, but the Plaintiff puts them both together, when he alledges them to be kept per Fraudem.

1 Roll. Abr. 802. 2. Cro. 626.

But on the other Side it was said, that all the Precedents are as in this Case, 8 Co. Turner's Case 132. 9 Co. Meriel Tresham's Case 108. And of that Opinion was all the Court, that the Replication was good: And Judgment was given for the Plaintiff.

Sid. 333.

Suffeild *versus* Baskervil.

No Breach can be assigned upon a Proviso.

DEBT upon Bond for Performance of all Covenants, Payments, &c. In an Indenture of Lease, wherein the Defendant for and in Consideration of 400 l. lent him by the Plaintiff, granted the Land to him for 99 Years, if G. so long lived, provided if he pay 60 l. per Annum Quarterly, during the Life

Life of G. or ſhall within Two Years after his Death pay the ſaid 400 l. to the Plaintiff, then the Indenture to be void, with a Clauſe of Re-entry for Non-payment.

The Defendant pleads Performance.

The Plaintiff aſſigns for Breach, that 30 l. for half a Year was not paid at ſuch a Time during the Life of G.

The Defendant demurrs.

For that the Breach was not well aſſigned, becauſe there is no Covenant to pay the Money, only by a Clauſe Liberty is given to re-enter upon Non-payment.

The Court inclined, That this Action would not lie upon this Bond, in which there was a Proviſo and no expreſs Covenant, and therefore no Breach can be aſſigned.

Benſon *verſus* Idle.

AUdita Querela, The Caſe upon Demurrer was, That before the King's Reſtauration, the now Defendant brought an Action of Treſpaſs againſt the Plaintiff for taking his Cloth, who then pleaded that he was a Soldier, and compelled by his Fellow Soldiers, who threatned to hang him as high as the Bells in the Belfry if he refuſed; To this the Plaintiff then replied, de Injuria ſuâ propriâ, &c. And it was found for him, and an Elegit was brought, and the now Plaintiff's Lands extended. Eſtoppel not well pleaded with a Traverſe.

Then comes the Act of *Indempnity, which pardons all Acts of Hoſtility done in the Times of Rebellion, and from thenceforth diſcharges Perſonal Actions for or by Reaſon of any Treſpaſs committed in the Wars, and all Judgments and Executions thereon before the firſt Day of May, 1658. but doth not reſtore the Party to any Sums of Mony, mean Profits or Goods taken away by Vertue of ſuch Execution, or direct the Party to give any Account for the ſame; which Act made by the Convention, was confirmed by 13 Car. 2. cap. 7. * 12 Car. 2. cap. 11.

And upon theſe Two Acts of Parliament, the Plaintiff (expreſly averring in his Writ, That the former Recovery againſt him was for an Act of Hoſtility) now brought this Audita Querela.

The Defendant pleads the former Verdict by way of Eſtoppel, and concludes with a Traverſe, abſq; hoc, that the taking of his Goods was an Act of Hoſtility.

This

This was argued by Holloway Serjeant for the Plaintiff, and by Jones Serjeant for the Defendant, who chiefly inſiſted, That the Defendant having pleaded the Subſtance of this Matter before, and being found againſt him, that he being now Plaintiff could not averr any Thing againſt that Record.

But the Court were all of Opinion, that Judgment ſhould be given for the Plaintiff; for his Remedy was very proper upon the Convention, and without the Statute of Confirmation: And here is no Eſtoppel in the Caſe; for whether this was an Act of Hoſtility or not, is not material; neither was it or could it be an Iſſue upon the former Tryal, becauſe all the Matter then in Queſtion was concerning the Treſpaſs, which though found againſt the now Plaintiff, yet it might be an Act of Hoſtility; but if it were an Eſtoppel, 'tis not well pleaded with a Traverſe, and the Court hath ſet it at large.

Hob. 207.

DE

DE
Term. Sanctæ Trin.

Anno 27 Caroli II. in Communi Banco.

Mayor and Commonalty of *London*, *versus* Gatford.

IN an Action of Debt brought by the Plaintiffs, for a Fine of 13 l. 6 s. 8 d. set upon the Defendant by the Steward of the Borough of Southwark, for that he refused to take the Oath and serve as a Scavenger in the said Borough, though duly Elected according to Custom there; and upon nil Debet pleaded, the Jury found a special Verdict: The Substance of which was, Construction of an Act of Parliament.

Viz. They find the Act of 14 Car. cap. 2. And the Proviso therein, which governed this Case, viz. That all Streets and Lanes in *London*, *Westminster*, and the Liberties thereof, shall be paved as they have always used to be.

Then follows another Clause, by which it is Enacted, That *Scavengers* shall be chosen in the City of *London*, and the Liberties thereof, according to the Ancient Usage and Custom; so likewise in the City of Westminster; but nothing is therein mentioned of Southwark. And in all other Places, a new Form of chooling is prescribed.

Viz. In the other Parishes, the Constables, Church-wardens, *&c.* shall meet in the *Easter*-Week, and choose Two *Scavengers* in every respective Parish; so that the Intent of the Act must be (though Southwark is not named) that still Scavengers shall be chosen there as formerly; because London and the Liberties thereof are to follow their Ancient Custom in the Choice of this Officer: And Southwark is within the City Liberties.

But whether the Custom of chooling of him was not taken away by this Statute, and so the Fine not well assessed, was the Question.

Bald-

Ex parte Quer. Baldwyn for the Plaintiffs argued, That admitting in Southwark a Scavenger may be chosen, according to the new Form prescribed in the Act; yet this Statute was only in the *Affirmative, and did not thereby take away the Custom of Choosing him at the Leet.

* Hob. 173. Dyer 341. b.

Like the Case in Dyer 50. An Act that the Youngest Son shall have an Appeal of the Death of his Father; yet that doth not exclude the Eldest, because 'tis the Common Law, and there are no Words to restrain him.

Hob. 17.

In the 11 Co. 63. Doctor Foster's Case: By the Statute of 35 Eliz. against Recusants, which gives the Penalty of 20 l. per Month against the Offender; the 12 d. for the Neglect of every Sunday, given by a former *Statute, is not taken away.

* 1 Eliz.

But where there is a Negative Clause in an Act of Parliament, the Law is otherwise: As an Act that the Sessions of the Peace shall be kept at Beaumarris tantum, & non alibi infra Com', &c. and the Justices kept it at another Place, and several were indicted before them at that Time; but the Justices were fined, and all their Proceedings held Coram non Judice, by Reason of the Negative Prohibition, Dyer 135.

1 Inst. Sect. 500. 2 Inst. 68.

By the Statute of Magna Charta, cap. 34. a Woman shall bring no Appeal but for the Death of her Husband, which she might at Common Law before the making of this Statute; if therefore she is Heir to her Father, the Appeal which she might have brought for his Death by these Negative Words is taken away.

Ex parte Def. Barrel for the Defendant: Though this Law be in the Affirmative, yet since it doth not prejudice any Person, neither can it be injurious, if Scavengers are chosen as directed by the Act, it shall be taken as a Negative Clause: And for this, many Instances may be given; as the Statute for devising Part of the Testator's Land, doth not take away the Custom to devise the whole, for that would be an apparent Prejudice to the Parties; but not so in this Case, where 'tis not found that the Lord of the Manor sustains any Loss, for he is to have nothing when a Scavenger is chosen in the Leet; nor are the Inhabitants prejudiced, for by this New Choosing their Streets shall be kept as clean as before.

The Form here established doth not consist with the Custom, and so hath the Effect of a Negative Clause, Hob. 298.

It appears by the Scope of the Act, That the Intent of the Parliament was to take away those old Customs of Choosing, be-

because the Customs are expressly saved in London and Westminster; but in all other Places a new Way is appointed.

The Pavement of the Streets in Southwark shall be as before; but that Clause goes no farther, and therefore concerns not the Case of a Scavenger, whose Duty is not to pave, but cleanse the Streets.

And the Words, viz. Liberties of the City of London, will not help; because Southwark is not comprehended under them in that Clause, no more than are the Lands which they have in Yorkshire; for the Word Liberties * there, is taken for Limits, and can admit of no other Construction. * Postea 48.

Lastly, That the Plaintiff cannot have Judgment, because he hath not alledged the Custom to be, That the Steward may fine in case of the Refusal to take the Oath, &c. and Customs are to be taken strictly.

The Chief Justice and Justice Atkins said, That 'tis true, Scavengers are under the Power of the Court-Leet by Custom, and in case of Refusal may be fined, as well as an Ale-Taster.

But this Act of Parliament having taking Notice, That there were Scavengers before that Time, and Southwark being therein named as distinct from the Liberties of London; for 'tis provided, That Westminster, London, and the Liberties thereof, and Southwark, are to have the Streets paved, as before, which doth not belong to the Office of a Scavenger; and so that Clause in the Act concerns not this Case.

But where it enacts, That in *London* and *Westminster*, *Scavengers* shall be chosen as before; but in all other Places appoints a new Way: This is as much as if it had said, That Scavengers shall be chosen in every Place as by the Act prescribed, and no other Way, except in London and Westminster; and so great is the Inconsistency between the Custom and the Act, that they cannot stand both together: Therefore, though the Act is but Temporary, the Custom is suspended; and though it may be some Damage to the Lord to make such Construction, yet that will not alter the Case, for Law-Makers are presumed to have Respect to the Publick Good more than to any Private Man's Profit; and the Lord may be said in this Case to have dispensed with his Interest, being a Party to the Act, and consenting thereunto.

But Wyndham and Ellis Justices, inclined, That the Custom did continue, because the Act was in the Affirmative; and there-

for they would not construe it to take away a Man's Right and Interest, or a Custom where he hath a Benefit, as the Lord of the Manor had in this Case, who is prejudiced by the Loss of his Fees; and the Intent of the Statute seemed to them to be, That Scavengers should be chosen where none were before, but not to take away Customs for chusing of them: But another Argument was desired by Serjeant Howel, the Recorder of London.

Rozal *versus* Lampen.

Variance in the Actions no Bar.

COnspiracy. Rozal declares, That a Replevin was brought against him and others, and that the Defendant Lampen appeared for him without any Warrant, and avowed in his Name, and suffered Judgment to pass against him, and that 22 l. 10 s. Damages were recovered against him at such a Place.

Lampen pleads a Recovery in a former Action brought by the now Plaintiff, the Record of which being recited in the Plea, appears to be the same with this; but only here the Place is mentioned where the Damages were recovered, which was omitted in the former Action, to which Lampen had pleaded a Retainer, by one of the then Defendants in Replevin, and upon a Demurrer had Judgment. But the Truth of the Case was, That Judgment was not then given for him that his Plea was good; for the Court were all of Opinion, that it was naught; but because the Declaration was not good, for want of mentioning the Place where, the Damages were recovered, which the Plaintiff had amended now.

The Plaintiff demurred again; because of this Variance between the Two Actions upon the Defendant's own shewing.

Ex parte Quer. Post. *Rose* and *Standen*, *Putt* and *Roster*.

Sir Robert Shastoe for the Plaintiff, insisted, That a Recovery in an Action is no Bar where there is a substantial Variance, as here there is; and that so it has been adjudged in the Case of Leach and Thompson, 1 Roll. Abr. 353. lit. B. pl. 1. where the Plaintiff declared, That he, at the Defendant's Request, having promised to marry the Defendant's Daughter, he promised to pay him 1000 l. Upon Non Assumpsit pleaded, Judgment was given for the Defendant. And the Plaintiff brought another Action for the same Sum, and then laid the Promise to pay 1000 l. cum inde requisitus esset; and it was adjudged, that the former Judgment was no Bar to the last Action; because

because there was a Material Difference between the Two Promises, One being laid without Request, and so the Money was to be paid in a convenient Time; and in the last, the Request is made part of the Promise, and must be specially alledged, with the Time and Place where it was made.

So in this Case, The Plaintiff had not declared Right in his first Action, which he had amended now; and therefore the former Judgment shall be no Bar to him.

In Robinson's Case there was a Mistake in the Writ, viz. A Formedon in Remainder, for that in Reverter, and held no Bar; so by a Parity of Reason there shall be no Bar here, because the First Declaration was mistaken, and it was vitium Clerici; Vide 2 Cro. 284. Level *versus* Hall. Stat. 3 H. 7. c. 1. Syd. 316.

Barton, Serjeant, contra; This is no new Action, for the Ground of it is, not where the Damages was done, or recovered, but the appearing without a Warrant; and so having pleaded a Retainer and had Judgment, and now pleading that Judgment to this Action, and averring 'twas for one and the same thing, 'tis a good Bar which the Plaintiff by his Demurrer hath confessed. Adjornatur. Ex parte Def.

Milward *versus* Ingram.

INdebitatus Assumpsit for 50 l. and quantum meruit, the Defendant confesses both; but pleads, That after the Promise made, and before the Action brought, they came to an Accompt concerning divers Sums of Money, and that he was found in Arrear to the Plaintiff 30 s. whereupon, in Consideration the Defendant promised to pay him the said 30 s. the Plaintiff likewise promised to release and acquit the Defendant of all Demands. One Promise pleaded in Discharge of another, good before the Breach. Mod. Rep 205.

The Plaintiff demurred.

Says, Serjeant, argued for the Plaintiff; that though one Promise may be discharged by another, yet a Duty certain cannot, (as in this Case) where a Demand was of a Sum certain by the Indebitatus; besides, this Plea is in Nature of an Accord, which cannot be good without an Averment of Satisfaction given, Broke Accompt 46, 48. Ex parte Quer.

Neither is it said, That the Plaintiff promised in Consideration that the Defendant ad Instantiam of the Plaintiff had promised.

Ex parte Def.

But it was answered by Serjeant Hopkins, and admitted to be true, That where a Matter is pleaded by way of Accord, it must be averred to be executed in all Points; but that was not the present Case.

2 Cro. 100.

The Defendant hath pleaded, That he and the Plaintiff had accounted together, and so the Contract is gone by the Accompt.

2. That he was discharged of the Contract by Parol, both which the Plaintiff had now admitted by his Demurrer.

And it will not be denied that a Parol Discharge of an Assumpsit is good; as if A. promises to perform such a Voyage within a Time limited, and the Breach assigned was, that he did not go the Voyage: The Defendant pleads, That the Plaintiff exoneravit eum, and upon Demurrer it was held good, 22 Ed. 4. 40. 3 H. 6. 37.

Object. If it be objected, That 'tis no Consideration to pay a just Debt; for if 30s. were due, of Right it ought to be paid, and that can be no Reason upon which to ground a Promise.

Answ. 'Tis a good Consideration to pay Money on the Day which the Party is bound to upon Bond, because it is paid without Suit or Trouble, which might be otherwise a Loss to the Plaintiff.

But in this Case here is an express Agreement, and before there was only a Contract in Law, Cro. Car. 8. Flight *versus* Crasden.

Curia.

North, Chief Justice. It has been always taken, that if there be an Assumpsit to do a Thing, and there is no Breach of the Promise, that it may be discharged by Parol; but if it be once broken, then it cannot be discharged without Release in a Writing.

In this Case there are two Demands in the Declaration, to which the Defendant pleads an Accompt stated, so that the Plaintiff can never after have Recourse to the first Contract which is thereby merged in the Accompt. If A. sells his House to B. for 10 l. and there being divers other Dealings between them; if they come to an Accompt upon the whole, and B. is found in Arrear 5 l. A. must bring his insimul Computasset, for he can never recover upon an Indebitatus Assumpsit; and of the same Opinion were the other three Justices: And though it was not said ad instantiam of the Plaintiff that he promised, yet it was adtunc & ibidem, and so should be intended that the Defendant made the Promise at the Instance of the Plaintiff, and so Judgment was given for the Defendant.

Daws

Daws *versus Sir* Paul Pindar.

COvenant to pay a Sum of Money within a Year after one Nokes shall be admitted to the Office of Secretary to the Governour of Barbadoes.

Barbadoes, Whether governed by the Laws of *England*, so that the Statute of buying Offices extends to it?

The Defendant pleads, That the Governour of Barbadoes and the Council there have Power of Probate of Wills, and granting of Administration; that the Secretary belongs, and is an Officer to the said Governour and Council as Register, and is concerned about the registring the said Wills, and so his Office concerns the Administration of Justice; and then sets forth, that this Covenant, upon which the Plaintiff brought his Action, was entred into upon a corrupt Agreement, and for that Reason void.

The Plaintiff replies, Protestando that this Office concerned not the Administration of Justice; and protestando, that here was no corrupt Agreement; pro placito he saith, that Barbadoes is extra quatuor Maria, and was always out of the Allegiance and Power of the Kings of England till King Charles the First reduced that Island to his Obedience, which is now governed by Laws made by him, and not by the Laws of England.

The Defendant rejoins, Protestando that this Island was governed by the Laws of England long before the Reign of King Charles the First, and confesses it to be extra quatuor Maria, but pleads that before King Charles had that Island, King James was seised thereof, and died such a Day so seised; after whose Death it descended to King Charles the First, as his Son and Heir; and that he being so seised, 2 Julii, in the Third Year of his Reign, granted it under the Great Seal of England to the Earl of Carlisle and his Heirs at such a Rent, absque hoc that King Charles the First acquired this Island by Conquest.

Ex parte Quer.

Baldwyn Serjeant demurred, for that the Traverse is ill; for the most material Thing in the Pleadings was, whether Barbadoes was governed by the Laws of England, or by particular Laws of their own? And if not governed by the Laws of England, then the Statute made 5 E. 6. cap. 16. concerning the Sale of Offices, doth not extend to this Place.

He said, that it was but lately acquired, and was not governed by the Laws of England; that it was first found out in King James his Reign, which was long after the making of that Statute, and therefore could not extend to it.

The

The Statute of 1 Ed. 6. cap. 7. Enacts, That no Writ ſhall abate if the Defendant (pending the Action) be created a Duke or Earl, *&c.* And it has been doubted whether this Act extended to a Baronet, being a Dignity created after the Making thereof, Sir Simon Bennet's Caſe. Cro. Car. 104.

Syd. 40.

Statutes of England extend no more to Barbadoes than to Scotland or Virginia, New England, Iſles of Jerſey and Gernſey; 'tis true, an Appeal lies from thoſe Iſlands to the King in Council here, but that is by Conſtitutions of their own. No Statute did extend to Ireland till Poyning's Law, nor now unleſs named. In Barbadoes they have Laws different from ours, as, That a Deed ſhall bind a Feme Covert, and many others.

Ex parte Def.

Seys, Serjeant, contra. He agreed that the Traverſe was ill, and therefore did not endeavour to maintain it, but ſaid there was a Departure between the Declaration and the Replication; for in the Declaration the Plaintiff ſets forth, that Nokes was admitted Secretary apud Inſulam de Barbadoes, *viz.* in Parochia Sancti Martini in Campis; and in the Replication he ſets forth, that this Iſle was not in England, which is in the Nature of a Departure; as Debt ſur obligat' 1 Maii, the Defendant pleads a Releaſe 3 Maii; the Plaintiff replies primo deliberat' 4 Maii; 'tis a Departure; for he ſhould have ſet forth that the Bond was 4 Maii primo deliberat', Quære, Bro. Departure 14.

So in a Quare Impedit, the Biſhop pleaded that he claimed nothing but as Ordinary. The Plaintiff replies, Quod tali Die & Anno he preſented his Clerk, and the Biſhop refuſed him; the Biſhop rejoins, that at the ſame Day another preſented his Clerk, ſo that the Church became litigious; and the Plaintiff ſur-rejoins, That after that Time the Church was litigious he again preſented, and his Clerk was refuſed; this was a Departure, Bro. Departure.

So likewiſe as to the Place, the Tenant pleads a Releaſe at C. The Demandant ſaith, That he was in Priſon at D. and ſo would avoid the Releaſe as given by Dureſs; and the Tenant ſaith, That he gave it at L. after he was diſcharged and at large, 40 E. 3. Bro. 32. 1 H. 6. 3.

The Plaintiff might have ſaid that Nokes was admitted here in England, without ſhewing it was at Barbadoes; for the Grant of the Office of Secretary might be made to him here under the Great Seal of England, as well as a Grant of Adminiſtration may be made by the Ordinary out of his Dioceſs.

2. Except. Viz. By the Demurrer to the Rejoinder; the Plaintiff hath confeſſed his Replication to be falſe in another Reſpect, for by that he hath owned it: The Defendant hath pleaded that

that King James was ſeiſed of this Iſland, and that it deſcended to King Charles, *&c.* and ſo is a Province of England; whereas before he had only alledged that it was reduced in the Time of King Charles, his Son, and ſo he hath falſified his own Replication.

And beſides, this is within the Statute of 5 Ed. 6. for the Defendant ſaith, that the Plaintiff hath admitted Barbadoes to be a Province of England; and it doth not appear that ever there was a Prince there, or any other Perſon who had Dominion, except the King and his Predeceſſors; and then the Caſe will be no more than if the King of England take Poſſeſſion of an Iſland, where before there was vacua Poſſeſſio, by what Laws ſhall it be governed? Certainly by the Laws of England.

This Iſland was granted to the Earl of Carliſle and his Heirs, under a Rent payable at the Exchequer, for which Proceſs might iſſue, and it deſcends to the Heirs of the Earl at the Common Law. And if it be objected, That they have a Book of Conſtitutions in Barbadoes; that is eaſily anſwered, for 'tis no Record, neither can the Judges take any Notice of it.

'Tis reaſonable that ſo good a Law as was inſtituted by this Statute of Ed. 6. ſhould have an extenſive Conſtruction, and that it ſhould be interpreted to extend as well to thoſe Plantations as to England; for if another Iſland ſhould be now diſcovered, it muſt be ſubject to the Law of England. Curia adviſare vult.

Lever *verſus* Hoſier.

Recovery ſuffered of Lands in a Liberty, paſſeth Lands in a Vill diſtinct within that Liberty. Mod. Rep. 206. Poſtea.

This was a ſpecial Verdict in Ejectment. The Caſe upon the Pleading was, viz. Sir Samuel Jones being Tenant in Tail of Lands in Shrewsbury and Cotton, being within the Liberties of Shresbury, ſuffers a Common Recovery of all his Lands lying within the Liberties of Shrewsbury; and whether the Lands in Cotton, which is a diſtinct Vill, though within the Liberties, ſhall paſs, was the Queſtion.

And it was argued by Serjeant Jones, that they ſhould not paſs; for though Lands would paſs ſo by a Fine, becauſe it was the Agreement of the Parties; yet in a Recovery 'tis otherwiſe, becauſe more Certainty is required therein.

But in Fines no ſuch Certainty is required, and therefore a Fine de Tenementis in Golden-Lane hath been held good, though neither Vill, Pariſh or Hamblet, is mentioned.

But

Cro. El. 693. Cro. Jac. 574. Addison *and* Ottoway, Postea.

But there being a Vill called Walton in the Parish of Street, and a Fine being levied of Land in Street, the Lands in Walton did not pass, unless Walton had been an Hamlet of Street, and the Fine had been levied of Lands in the Parish of Street.

And the Reason of this Difference is, because in Fines there are Covenants, which, though they are Real in respect of the Land, yet 'tis but a Personal Action, in which the Land is not demanded ex directo; but in a Recovery greater Precisenels is required, that being a Præcipe quod reddat where the Land it self is demanded, and the Defendant must make Answer to it, Cro. Jac. 574. 5 Co. 40. Dormer's Case.

* Antea 41.

The Word * Liberty properly signifies a Right, Privilege, or Franchise, but improperly the Extent of a Place, Hill. 22 & 23 Car. 2. Rot. 225. B. R. Waldron's Case, Hutton 106. Baker and Johnson's Case.

Liberties in Judgment of Law are Incorporeal, and therefore 'tis absurd to say, that Lands which are Corporeal shall be therein contained.

They are not Permanent, having their Existence by the King's Letters Patents, and may be destroyed by Act of Parliament; they may also be extinguish'd, abridged or increased, and a Venire fac. of a * Liberty or Franchise is not good; 'tis an equivocal Word, and of no Signification that is plain, and therefore is not to be used in real Writs, Rast. Entr. 382.

* Rast. Ent. 267.

There is no Præcipe in the Register to recover Lands within a Liberty, neither is there any Authority in all the Law-Books for such a Recovery; and therefore if such a Thing should be allowed, many Inconveniences would follow; for a good Tenant to the Præcipe would be wanting, and the Intent of the Parties could not supply that.

But Barton, Serjeant, said, That this Recovery would pass the Lands in Cotton; for as to that Purpose, there was no Difference between a Fine and a Recovery; they are both become Common Assurances, and are to be guided by the Agreement of the Parties, Cro. Car. 270, 276.

Postea. 2 Roll. Abr. 20. Godb. 440.

'Tis true, a Fine may be good of Lands in an Hamlet, Lieu Conus or Parish, 1 H. 5. 9. Cro. Eliz. 692. Jones 301. Cro. Jac. 574. Monk *versus* Butler. Yet in a * Scire Fac. to have Execution of such Fine, the Vill must be therein mentioned, Bro. Brief 142.

* Godb. 440. contra.

The Demand must be of Lands in a Vill, Hamlet, or at farthest in a Parish, Cro. Jac. 574.

And

And of that Opinion was the whole Court (abſente Ellis) who was alſo of the ſame Opinion at the Argument; and accordingly in Michaelmas Term following Judgment was given, that by this Recovery the Lands in Cotton did well paſs.

And North Chief Juſtice denied the Caſe in Hutton 106. to be Law, where 'tis ſaid, A common Recovery of Lands in a Lieu Conus is not good; and ſaid, That it had been long diſputed whether a Fine of Lands in a Lieu Conus was good; and in King James his Time the Law was ſettled in that Point, that it was good; and by the ſame Reaſon a Recovery ſhall be good, for they are both Amicable Suits and Common Aſſurances; and as they grew more in Practice, the Judges have extended them farther. Poſtea.

A Common Recovery is held good of an Advowſon; and no Reaſons are to be drawn from the Viſne, or the Execution of the Writ of Seiſin, becauſe 'tis not in the Caſe of adverſary Proceedings, but by Agreement of the Parties, where 'tis to be preſumed each knows the others Meaning.

Indeed, the Curſitors are to blame to make the Writ of Entry thus, and ought not to be ſuffered in ſuch Practice.

Where a Fine is levied to Two, the Fee is always fixed in the Heirs of one of them; but if it be to them and their Heirs, yet 'tis good, though incertain; but a Liberty is in the nature of a Lieu Conus, and may be made certain by Averment.

The Jury in this Caſe have found Cotton to be a Vill in the Liberty of Shrewsbury, and ſo 'tis not Incorporeal.

Alford *verſus* Tatnel.

JUdgment againſt Two, who are both in Execution, and the Sheriff ſuffers one to eſcape; the Plaintiff recovers againſt the Sheriff, and hath Satisfaction, the other ſhall be diſcharged by an Audita Querela. Mod. Rep. 170.

Osbaston *versus* Stanhope.

General Replication good.

DEBT upon Bond against an Heir, who pleaded, that his Ancestor was seised of such Lands in Fee, and made a Settlement thereof to Trustees, by which he limited the Uses to himself for Life, Remainder to the Heirs Males of his Body, Remainder in Fee to his own right Heirs, with Power given to the Trustees to make Leases for Three Lives, or 99 Years.

The Trustees made a Lease of these Lands for 99 Years, and that he had not Assets præter the Reversion expectant upon the said Lease.

The Plaintiff replies, Protestando that the Settlement is fraudulent, pro Placito saith, that he hath Assets by Discent sufficient to pay him; and the Defendant demurs.

Ex parte Def.

Newdigate Serjeant. The Bar is good, for the Plaintiff should not have replied generally that the Defendant hath Assets by Discent, but should have replied to the Præter, Hob. 104.

Like the Case of Goddard and Thorlton, Yelv. 170. where in Trespass the Defendant pleaded, that Henry was seised in Fee, who made a Lease to Saunders, under whom he derived a Title, and so justifies.

The Plaintiff replies, and sets forth a long Title in another Person, and that Henry entred and intruded.

The Defendant rejoins, That Henry was seised in Fee, and made a Lease ut prius, absq; hoc that intravit & se sic intrusit; and the Plaintiff having demurred, because the Traverse ought to have been direct, viz. absq; hoc quod intrusit, and not absq; hoc that Henry intravit, &c. it was said the Replication was ill; for the Defendant having alledged a Seisin in Fee in Henry, which the Plaintiff in his Rejoinder had not avoided, but only by supposing an Intrusion which cannot be of an Estate in Fee, but is properly after the Death of Tenant for Life; for that Reason it was held ill.

Ex parte Quer.

But Pemberton, Serjeant for the Plaintiff, held the Replication to be good. The Defendant's Plea is no more than Riens per descent; for though he pleads a Reversion, 'tis not chargeable, because 'tis a Reversion after an Estate Tail, and therefore the pleading the Lease is not material; for if there were a Lease expired, yet the Plaintiff could not recover, and therefore the Præter is wholly idle and insignificant, of which the Plaintiff ought not to take

take Notice, because the Lands, which come under the Præter, are not chargeable.

The Plaintiff hath traversed, as he ought, what is material, and is not bound to take Notice of any Thing more.

And of that Opinion was the whole Court, and held that Præter idle, and the general Replication good; and Judgment was given for the Plaintiff.

Prince *versus* Rowson, *Executor of* Atkinson.

EXecutor de son Tort cannot retain. The Defendant in this Case pleaded, That the Testator owed his Wife dum sola 800 l. and that he made his Will, but doth not shew that he was thereby made Executor; and therefore having no Title he became Executor de son Tort, for which Cause his Plea was held ill; and Judgment was given for the Plaintiff.

Executor de son Tort cannot retain. 1 Mod. 128.

Norris *versus* Palmer.

THE Plaintiff brought an Action on the Case against the Defendant, for causing him falso & malitiose to be indicted for a Common Trespass in taking away One hundred Bricks, by which Means he was compelled to spend great Sums of Money, and that upon the Trial the Jury had acquitted him.

Case after an Acquittal upon an Indictment for Trespass.

The Defendant demurred to the Declaration; and Barrel Serjeant said for him, that the Action would not lie; and for a Precedent in the Case, he cited a like Judgment between Langley *versus* Clerk in the King's-Bench, Trin. 1658. In which Action the Plaintiff was indicted for a Battery with an Intent to ravish a Woman, and being acquitted, brought this Action; and the Court, after a long Debate, gave Judgment for the Plaintiff; but agreed, that the Action would not lie for a Common Trespass, as if it had been for the Battery only; but the Ravishing was a great Scandal, and for that Reason the Plaintiff recovered there; but this is an ordinary Trespass, and therefore this Action will not lie.

2 Sid. 100.

But Pemberton Serjeant held, that the Action would lie, because it was in the Nature of a Conspiracy, and done falsly and maliciously knowing the contrary, and thereby the Plaintiff was put to great Charges, all which is confessed by the Demurrer.

Sid. 463, 464. 1 Cro. 291.

And the Case cited on the other Side is express in the Point; for the Court in that Case could take Notice of nothing else but the Battery; for the Intent to Ravish was not traversable, and therefore it was idle to put it into the Indictment.

It is now settled, that an Action on the Case will lie for a malitious Arrest where there is no probable Cause of Action; and this Case is stronger than that, because in the one the Party is only put to Charges, and in the other, both to Charges and Disgrace, for which he hath no Remedy but by this Action.

The Court agreed, that the Action would lie after an Acquittal upon an Indictment for a greater or lesser Trespass: The like for citing another into the Spiritual Court without Cause, F. N. B. 116. D. 7 E. 4. 30. 10 H. 4. Fitz. Conspiracy 21. 13. 3 E 3. 19.

3 Ass. 13. T. Jones 132. 1 Rol. Abr. 112. pl. 9. Postea.

The Defendant's Council consented to wave the Demurrer, and plead and go to Tryal.

The King *versus* Turvil.

The King presented, being intituled by a Simoniacal Contract, his Presentee shall not be removed tho' the Simony is pardoned.

Quare Impedit. The King was intituled to a Presentation by the Statute of 31 Eliz. cap. 6. because of a Simoniacal Contract made by the rightful Patron, and he accordingly did present.

Then comes the Act of General Pardon, 21 Jac. cap. 35. by which under general Words (it was now admitted) that Simony was pardoned: In which Act there is a beneficial Clause of Restitution: viz. The King giveth to his Subjects all Goods, Chattels, Debts, Fines, Issues, Profits, Amerciaments, Forfeitures, and Sums of Money forfeited by reason of any Offence, *&c.* done.

And whether the King's Presentee or the Patron had the better Title, was the Question.

This Case was only mentioned now, but argued in Michaelmas Term following by Serjeant Jones, that the King's Presentee is intituled; he agreed that Simony was pardoned, but not the Consequences thereof; for 'tis not like the Case where a Stroak is given at one Time, and Death happens at another; if the Stroak, which is the first Offence, is pardoned before the Death of the Party, that is a Pardon likewise of the Felony; for 'tis true, the Stroak being the Cause of the Death, and that being pardoned, all the natural Effects are pardoned with the Cause.

But legal Consequences are not thus pardoned; as if a Man is outlawed in Trespass, and the King pardons the Outlawry, the Fine remains, 6 E. 4 9. 8 H. 4. 21. 2 Roll. Abr. 179.

In

In this Act of Pardon there are Words of Grant, but the Presentation is not within the Clause of Restitution; for 'tis an Interest and not an Authority vested in the King, and therefore a Thing of another Nature than what is intended to be restored; because it is higher, and shall not be comprehended amongst the general Words of Goods and Chattels, &c. which are Things of a lower Nature, and are all in the Personality. Cro. Car. 354.

Conyers Serjeant, argued for the Title of the Patron, and said, that there were Three material Clauses in this Act. Ex parte Def.

1. A Pardon of the Offences therein mentioned in general and particular Words.

2. That all Things not excepted shall be pardoned by General Words, as if particularly named.

3. The Pardon to be taken most favourably for the Subject; upon which Clauses it must necessarily follow, that this Offence is pardoned, and then all the Consequences from thence deduced will be likewise pardoned; and so the Patron restored to his Presentation, for all Charters of Restitution are to be taken favourably, Pl. Com. 252.

The Presentation vests no legal Right in the Presentee; for in the Case of the King, 'tis revocable after Institution and before Induction, Co. Lit. 344. b.

So likewise a Second Presentation will repeal the First, Rolls 353. And if the King's Presentee dies before Induction, that is also a Revocation; if therefore the Party hath no legal Right by this Presentation, and the King by the Simony had only an Authority to present, and no legal Interest vested, then by this Act he hath revoked the Presentation, and the right Patron is restored to his Title to present.

The Court were all of Opinion (absente Ellis) That the King's Presentee had a good Title, and by consequence the Patron had no Right to present this Turn; for here was an Interest vested in the King; like the Case where the King is intituled to the Goods of a Felo de se by Inquisition, and then comes an Act of Indempnity, that shall not divest the King of his Right.

But where nothing vests before the Office found, a Pardon before the Inquisition extinguishes all Forfeitures, as it was resolved in Tomb's Case.

So if the Pardon in this Case had come before the Presentation, the Party had been restored Statu quo, &c. Hob. 167.

The

The King can do no more, the Biſhop is to do the reſt; neither is the Preſentation revoked by this Act; it might have been revoked by Implication in ſome Caſes; as where there is a ſecond Preſentation; but ſuch a general Revocation will not do it; and Judgment was given for the Plaintiff, and a Writ of Error brought, but the Cauſe was ended by Agreement.

Hill *verſus* Pheaſant.

Gaming at ſeveral Meetings, whether within the Statute.

AN Action of Debt was brought upon the Statute of 16 Car. 2. cap. 7. made againſt deceitful and diſorderly Gaming which enacts, That if any Perſon ſhall play at any Game, other than for ready Money, and ſhall loſe any Sum, or other Thing played for, above the Sum of 100 l. at any one Time or Meeting upon Tick, and ſhall not then pay the ſame; that all Contracts and Securities made for the Payment thereof ſhall be void, and the Perſon winning ſhall pay treble the Money loſt.

It happened that the Defendant won 80 l. at one Meeting, for which the Plaintiff gave Security; and another Meeting was appointed, and the Defendant won 70 l. more of the Plaintiff; being in all above 100 l. And if this was within the Statute, was a Queſtion.

The like Caſe was in the King's Bench, Trin. 25 Car. 2. Rot. 1230. between Edgberry and Roſeberry; and in Michaelmas Term following this Caſe was argued, and the Court was divided, which the Plaintiff perceiving, deſired to diſcontinue his Action; but the better Opinion was, that it was not within the Statute, though if it had been pleaded, That the ſeveral Meetings were purpoſely appointed to elude the Statute, it might be otherwiſe.

Anonymus, Poſtea.

Sid. 394.

Calthorp *verſus* Heyton.

Traverſe not good; *viz. Abſq; hoc quod legitimo modo oneratus.*

IN Replevin; The Defendant avowed, for that the King being ſeiſed in Fee of a Manor, and of a Grange, which was Parcel of the Manor, granted the Inheritance to a Biſhop, reſerving 33 l. Rent to be Yearly iſſuing out of the whole, and alledges a Grant of the Grange from Sir W. W. (who claimed under the Biſhop) to his Anceſtors in Fee; in which Grant there was this Clauſe;

Viz. If the Grantee or his Heirs ſhall be legally charged by Diſtreſs, or with any Rent due to the King or his Succeſſors, upon

upon account of the ſaid *Grange*, that then it ſhould be lawful for them to enter into *Blackacre*, and diſtrein till he or they be ſatisfied.

And afterwards the Grantee and his Heirs were, upon a Bill exhibited againſt them in the Exchequer, decreed to pay the King 4 l. per Annum, as their Proportion out of the Grange, for which he diſtreined, and ſo juſtified the taking.

The Plaintiff pleads in Bar to the Avowry, and traverſeth, that the Defendant was lawfully charged with the ſaid Rent; and the Defendant demurred.

Baldwyn, Serjeant, maintained the Avowry to be good, having alledged a legal Charge, and that the Bar was not good; for the Plaintiff traverſeth quod Defendens eſt ligitimo modo oneratus, which being part Matter of Law, and part likewiſe Matter of Fact, is not good; and therefore if the Decree be not a legal Charge, the Plaintiff ſhould have demurred. Ex parte Def.

But on the other Side, it was argued by Seys Serjeant, That the Avowry is not good; becauſe the Defendant hath not ſet forth a legal Charge, according to the Grant, which muſt be by Diſtreſs, or ſome other lawful Way, and that muſt be intended by ſome Execution at Common Law; for the Coactus fuit to pay, is not enough; a Suit in Equity is no legal Diſturbance, Moor 559. The ſame Caſe is reported in 1 Brownl. 23. Selbey *verſus* Chute. Ex parte Quer.

Beſides, the Defendant doth not ſhew any Proceſs taken out, or who were Parties to the Decree, and a Que Eſtate in the Caſe of a Biſhop is not good, for he muſt paſs it by Deed.

North and the whole Court: A Rent in the King's Caſe lies in Render, and not in Demand, and after the Rent-Day is paſt, he is oneratus, and the Decree is not material in this Caſe; for the Charge is not made thereby, but by the Reſervation, for Payment whereof the whole Grange is chargeable.

The King may diſtrain in any Part of the Land, he is not bound by the Decree to a particular Place; that is in Favour only to the Purchaſor, that he ſhould pay no more than his Proportion.

As to the Que Eſtate, the Defendant hath admitted that, by ſaying bene & verum eſt, that Sir W. W. was ſeiſed.

The Traverſe is ill, and Judgment was given for the Avowant.

Vaughan

Vaughan *versus* Wood.

Treſpaſs juſtified, for taking corrupt Victuals.

Mod. Rep. 202.

TReſpaſs for taking Beef; The Defendant pleads a Cuſtom to chooſe Superviſors of Victuals at a Court-Leet; That he was there choſen, and having viewed the Plaintiff's Goods, found the Beef to be corrupt, which he took and burned.

The Plaintiff demurs, for that the Cuſtom is unreaſonable, and when Meat is corrupt and ſold, there are proper Remedies at Law, by Action on the Caſe, or Preſentment at a Leet, 9 H 6. 53. 11 Ed. 3. 4. 6. Vide Stat. 18 Eliz. cap. 3.

But the Court held it a good Cuſtom, and Judgment was given for the Defendant; the Chief Juſtice being not clear in it.

Chapter of *Southwel verſus* Biſhop of *Lincoln.*

Grant of next Avoidance, not bind the Succeſſor.

Mod. Rep. 204.

* Yelv. 106.

† Cro. Eliz. 441.

IN a Quare Impedit, the Queſtion upon pleading was, Whether the Grant of the next Avoidance by the Chapter was good or not to bind the Succeſſor?

The Doubt did ariſe upon the Statute of 13 Eliz. cap. 10. which was objected not to be a publick * Act, becauſe it extends only to thoſe who are Eccleſiaſtical Perſons; or if it ſhould be adjudged a publick Law, yet this is not a good Grant to bind the Succeſſor; for though the Grant of an Avoidance is not a Thing of which any Profit can be made, yet it is an † Hereditament within the Meaning of that Statute; by which, among other Things, 'tis enacted, That all Grants, *&c.* made by Dean and Chapter, *&c.* of any Lands, Tythes, Tenements, or Hereditaments, being Parcel of the Poſſeſſions of the Chapter, other than for the Term of 21 Years, or Three Lives, from the Time of the making the ſaid Grant, ſhall be void.

But it was agreed by the Court to be a general Law; like the Statute of Non Reſidency, which hath been ſo ruled; and that this Preſentment or Grant of the next Avoidance was not good, becauſe it was made by thoſe who were not Head of the Corporation, and it muſt be void immediately, or not at all; and Judgment was given accordingly.

Thread-

Threadneedle *versus* Lynham.

THere being Two Manors usually let for 67 l. 1 s. 5 d. by the Year; a Bishop lets one of them for 21 Years reserving the whole Rent, and whether this was a good Lease within the Statute of 1 Eliz. cap. 19. was the Question, which depended upon the Construction of the Words therein, viz. All Leases to be void upon which the old accustomed Rent is not reserved; and here is more than the old Rent reserved; and this being a private Act, is to be taken literally.

Lease by a Bishop and more than the old Rent reserved, good. Mod. Rep. 203.

North Chief Justice agreed, that private Acts, which go to one particular Thing, are to be interpreted literally; but this Statute extends to all Bishops, and so may be taken according to Equity; and therefore he, and Wyndham and Atkins Justices, held the Lease to be good: But this Case was argued when Vaughan was Chief Justice, and he and Justice Ellis were of another Opinion.

DE
Term. Sancti Mich.

Anno 27 Car. II. in Communi Banco.

Thorp *verſus* Fowle.

No more Coſts than Damage.

NOTA. In this Caſe the Court ſaid, That ſince the Statute, which gives no more Coſts than Damage, 'tis uſual to turn Treſpaſs into Caſe.

Cooper *verſus* Hawkeſwel.

Words.

IN an Action upon the Caſe for theſe Words: I dealt not ſo unkindly with you when you ſtole a Stack of my Corn: *Per Curiam*, the Action lies.

Eſcourt *verſus* Cole.

Words.

IN an Action on the Caſe for Words laid Two Ways; the laſt Count was Cumque etiam, which is but a Recital, and dubitatur whether good.

Sharp *verſus* Hubbard.

6 Months for proving of a Suggeſtion. Hob. 179.

THE Six Months in which the Suggeſtion is to be proved, muſt be reckoned according to the Calendar Months, and and 'tis ſo computed in the Eccleſiaſtical Court.

Crowder *verſus* Goodwin.

Juſtification by Proceſs out of inferiour Court.

IN Aſſault and Battery, and falſe Impriſonment: As to the Aſſault, &c. the Defendant pleads Not-Guilty; and as to the Impriſonment, he juſtifies by a Proceſs out of an inferiour Court; and upon Demurrer theſe Exceptions were taken to his Plea.

1. The

1. The Defendant hath ſet forth a Precept directed Servienti ad Clavem, and 'tis not ſaid Miniſtro Curiæ.

2. It was to take the Plaintiff, and have him ad proximam Curiam, which is not good; for it ſhould have been on a Day certain, like * Adams and Flythe's Caſe, where a Writ of Error was brought upon a Judgment in Debt by Nil dicit in an inferiour Court; and the Error aſſigned was, That after Imparlance a Day was given to the Parties 'till the next Court; and this was held to be a Diſcontinuance, not being a Day certain. 1 Rol. 484. Cro. Car. 254. Dyer 262, b. * Cro. Jac. 571. Mod. Rep. 81.

3. 'Tis not ſaid ad reſpondend' alicui.

4. Nor that the Action aroſe infra Burgum.

5. The Precept is not alledged to be returned by the Officer.

To all which it was anſwered, That a Plaint is but a Remembrance, and muſt be ſhort, Raſt. 321. and when 'tis entred, the Officer is excuſed; for he cannot tell whether 'tis * infra Juriſdictionem or not. * Squibb *verſus* Hole antea 29.

And as to the firſt Exception, a Precept may be directed to a private Perſon, and therefore Servienti ad Clavem is well enough.

Then as to the next Exception, 'tis likewiſe well ſet forth to have the Plaintiff ad proximam Curiam; for how can it be on a Day certain, when the Judge may adjourn the Court de Die in Diem?

Then ad reſpondendum, though 'tis not ſaid alicui, 'tis good, though not ſo formal; and 'tis no Tort in the Officer, but 'tis to be intended that he is to anſwer the Plaintiff in the Plaint.

As to the Fourth Exception, the Defendant ſets forth, That he did enter his Plaint ſecundum conſuetudinem Curiæ Burgi, and when the Plaintiff declared there, he ſhewed that the Cauſe did ariſe infra Juriſdictionem.

And as to the laſt, The Officer is not puniſhable though he do not return the Writ. The End of the Law is, That the Defendant ſhould be preſent at the Day; and if the Cauſe ſhould be agreed, or the Plaintiff give a Releaſe when the Defendant is in Cuſtody, no Action lies againſt the Officer if he be detained afterwards.

But the Chief Juſtice doubted, that for the Second Exception the Plea was ill, for it ought to be on a Day certain, and likewiſe it ought to be alledged infra Juriſdictionem.

But the other Three Juſtices held the Plea to be good in omnibus, and ſaid, that the inferior Court had a Juriſdiction to iſſue out a Writ, and the Officer is excuſable, though the Cauſe of Action did not ariſe within the Juriſdiction, which ought to be ſhewn on the other Side: And ſo Judgment was given for the Defendant.

Snow *and others*, *verſus* Wiſeman.

Traverſe neceſſary where omitted, is Subſtance.

TRespals for taking of his Horſe: The Defendant pleads, that he was ſeiſed of ſuch Lands, and intitles himſelf to an Herriot.

The Plaintiff replies, That another Perſon was jointly ſeiſed with the Defendant, Et hoc paratus eſt verificare.

The Defendant demurs generally, becauſe the Plaintiff ſhould have traverſed the ſole Seiſin.

Sid. 300.

But it was ſaid for him, that the ſole Seiſin need not be traverſed, becauſe the Matter alledged by him avoids the Bar without a Traverſe.

In a Suggeſtion upon a Prohibition for Tythes, the Plaintiff entituled himſelf by Preſcription under an Abbot, and ſhews the Unity of Poſſeſſion by the Statute of 31 H. 8. by which the Lands were diſcharged of Tythes.

Yelv. 231. Pl.Com.230, 231.

The Defendant pleads, That the Abbey was founded within Time of Memory, and confeſſeth the Unity afterwards, and the Plea was held good; for he need not traverſe the Preſcription, becauſe he had ſet forth the Foundation of the Abbey to be within Time of Memory, which was a ſufficient avoiding the Plaintiff's Title, Yelv. 31.

The Plaintiff therefore having ſaid enough in this Caſe to avoid the Bar; if he had traverſed it alſo, it would have made his Replication naught, like the Caſe of * Bedel and Lull, where in an Ejectment upon the Leaſe made by Elizabeth the Defendant pleads, that before Elizabeth had any Thing in the Lands, James was ſeiſed thereof in Fee, and that it deſcended to his Son, and ſo derives a Title under him, and that Elizabeth was ſeiſed by Abatement.

* Cro. Jac. 221.

The Plaintiff confeſſes the Seiſin of James, but that he deviſed it to Elizabeth in Fee, and makes a Title under her, abſq; hoc that ſhe was ſeiſed by Abatement; and upon a Demurrer, the Replication was held ill, becauſe the Plaintiff had made a good Title before the Deviſe to James; and ſo need not traverſe the Abatement.

The Chief Juſtice held, that the omitting of a Traverſe where neceſſary is Matter of Subſtance, and the concluding with hoc paratus eſt verificare, when it ſhould be Et hoc per' quod inquiratur per partiam, or de hoc ponit' ſuper patriam, or vice verſa, is Matter of Subſtance, and the wanting a Traverſe is of the ſame Nature; and here the Traverſe of the ſole Seiſin is neceſſary, becauſe it is iſſuable; And of the ſame Opinion were the other Judges (abſente Ellis) and therefore Judgment was given for the Defendant.

Wilſon

Wilson *versus* Ducket.

TRespass for taking of his Corn; the Defendant pleads Not-Guilty to all but 360 Sheaves made into Stacks, which the Defendant distrained for Rent and Services in Arrear and due to him. The Plaintiff demurs, for that they could not be distrained in Sheaves: A Distress of them is lawful Damage feasant, or in a Cart for Rent, but not here. Distress not good of Corn in Shocks.

Per Jones, Serjeant, it is naught, because nothing is to be distrained, but what may be known and returned in the same Condition as when taken; and therefore a Replevin will not lie of Money out of a Bag or Chest, and in this Case the *Corn cannot be returned in the same Condition, because a great deal may be lost in the carrying of it Home, 18 H. 3. 4. 2 H. 4. 15. 22 E. 4. 50. 11 H. 5. 14. 1 Inst. 47. Roll. 667. pl. 17. And of that Opinion was all the Court. Ex parte Quer.

* Altered by Stat. 2 *Will. & Mar.*

Curtis *versus* Bourn.

IN Waste, one Tenant in Common brings an Action of Waste alone; and the Question upon the Pleadings was, Whether he should not have joined with his Companion; and for an Authority that they should join in this Action, Scroggs, Serjeant, cited Rolls Abr. 2 Part 825. pl. 11. where it is said, That if a Reversion be granted to Two, and the Heirs of one of them, yet they must join in an Action of Waste. Tenant in Common need not join in an Action of Waste.

But it was answered by Pemberton, Serjeant, That Rolls cited that Case in his Abridgment out of the 1 Inst. 53. which seemed to be the Opinion of my Lord Coke, grounded upon the Authorities there cited in the Margin, which he said did not warrant any such Opinion.

The Difference upon the Books is, where Tenant in Common demands an Intirety, the Writ shall abate; and therefore in the Case of Hill and Hart, where the Plaintiff had only a third Part of a Reversion in Common, it was held he should not have an Action of Waste alone, because it would be very inconvenient that the third Part should be delivered in Execution. Cro. Eliz. 357. Co. Lit. 197. b. Moor 374.

'Tis

Co. Lit. 198. Yelv. 161.

'Tis true, they shall join in the Personality, where Damages are to be recovered, but they shall always sever in the Reality; and therefore in this Case, Waste being a mixt Action, and savouring of the Reality, that being the more worthy, draws over the Personality with it, and therefore the Action by one alone is good; but if they had made a Lease for Years, then they should have joined in an Action of Waste: And of that Opinion was the whole Court.

Anonymus.

Tout temps prist, no good Plea after Imparlance.

THE Question was, Whether Tout tempus prist was a good Plea, after a general Imparlance?

And it was insisted for the Plaintiff, That this Plea was repugnant, because the Imparlance proves the contrary.

'Tis true, in an Action of Debt upon a Bond, such Plea is good after an Imparlance, because 'tis to save the Penalty; and 'tis held in Dyer f. 300. b. That Uncore prist alone, without saying Tout temps, in such Case is good, though Leonard the Custos Brevium, and who was a Learned Man, was there of another Opinion.

Cro. Jac. 627. *contra.*

But when a single Duty is demanded, and the Party is intituled to Damages for Non-payment, in such Case the Plea of Tout temps prist is not good.

And though it was objected, that the Difference is, That the Defendant after Imparlance should not plead any Thing contrary to the Matter in the Declaration to which he had imparled; as Bastardy to an Action brought by an Heir, &c. Yet the Court were all of Opinion, That the Plea was not good, because 'tis inconsistent with the Imparlance; for Petit licentiam interloquendi, is no more in English than for the Defendant to say, I will take Time, and resolve what to do; which is contrary, to be always ready.

DE

DE
Termino Sancti Hill.

Anno 27 & 28 Caroli II. in Communi Banco.

Stubbins *verſus* Bird & *alios*.

IN an Action of Trover and Converſion; the Plaintiff declared for taking 600 Load of Oar.

The Defendant pleads, That the Plaintiff never had any Thing in the ſaid 600 Load of Oar, niſi conjunctim & pro in diviſo, with Two others, and ſo concludes in Abatement.

The Defendant concludes in Abatement, it ſhall be in his Election to have it taken in Bar.

Mod. Rep. 117.

The Plaintiff replies, That J. S. was ſeiſed in Fee of a Cloſe, in which this Oar was digged; and being ſo ſeiſed, he died; after whoſe Death the ſaid Cloſe deſcended to A. and B. his Two Daughters and Co-heirs; and that the Plaintiff married one of them, and the other was alſo married: And ſo the Plaintiff and the other Husband, and their Wives, were ſeiſed in Right of their ſaid Wives of this Cloſe.

That afterwards, and before the Action brought, 2000 Load of Lead Oar was digged out of the ſaid Cloſe, and laid there in Heaps; and then a Partition was made by Deed of the ſaid Cloſe and the Oar, and 1000 Load was allotted to one Siſter and her Husband, and the other 1000 Load was allotted to the Plaintiff, per quod he became ſolus Poſſeſſionar' of the ſaid 1000 Load in ſeveralty; and being ſo poſſeſſed, the Defendant found 600 Load, Parcel of the ſaid 1000 Load, and converted it, Abſque hoc that the Plaintiff had any Thing after the Partition conjunctim with any other Perſon.

The Defendant rejoins, That at the Time of the Converſion the Plaintiff had nothing but Conjunctim with the other, as before.

1. And the Plaintiff demurred, for that the Defendant ought to have traverſed the Partition; for though the Poſſeſſion was joint, the Partition had made it ſeveral, by which the joint Poſſeſſion was

Ex parte Quer.

was confeſſed and avoided, and therefore the Traverſe good; like the Rule laid down in my Lord Hobart 104. in Digby and Fitzherbert's Caſe, Treſpaſs, tali die; the Defendant confeſſes it, but pleads a Releaſe of all Actions, and traverſeth all Treſpaſſes after; ſo here the Plaintiff hath traverſed the joint Poſſeſſion after the Partition.

2. The Rejoinder is a Departure from the Plea, which is, that the Plaintiff never had any Thing but jointly with others; and the Rejoinder is, That at the Time of the Converſion he was jointly poſſeſſed; which is a manifeſt Difference in Point of Time, and ſuch as will make a Departure, 33 H. 14. Bro. Departure 28. 13.

Ex parte Def. It was argued by Serjeant Hopkins for the Defendant, That the Replication was not good; for the Plaintiff therein had alledged a Partition by Deed, and doth not ſay, hic in Curia Prolat': And in all Caſes where a Man pleads a Deed, by which he makes himſelf either Party or Privy, he muſt produce it in Court: As where the Defendant juſtifies in Treſpaſs, that before the Plaintiff had any Thing. One Purfrey was ſeiſed in Fee of the Place where, &c. And by Indenture, &c. demiſed it to Corbet, excepting the Wood, &c. Habendum for the Life of Ann, and covenanted quod licitum foret for the ſaid Corbet to take Houſe-boot, &c. That he aſſigned his Intereſt to Ann, and that the Defendant, as her Servant, took the Trees; and upon Demurrer the Plea was held naught, becauſe (though a Servant) having juſtified by force of a Covenant, he did not ſhew the Indenture, 2 Cro. 291. Purfrey *verſus* Grimes. 6 Rep. Bellamy's Caſe.

1 Leon. 309. Rol. Rep. 20. If a Thing will paſs without a Deed, yet if the Party pleads a Deed, and makes a Title thereby, he muſt come with a * Profert hic in Curia.

As to the Objection, That there was a Departure, he argued to the contrary: For the Defendant in his Rejoinder inſiſts only on that which was moſt material; and the Plaintiff in his Replication had given him Occaſion thus to rejoin; and though he had left out ſome of the Time mentioned in the Bar, yet that would not hurt the Pleadings, becauſe a fair Iſſue was tendred; for if at the Time of the Converſion he was jointly ſeiſed, he could not be entituled to the Action alone.

Judgment. And afterwards, in Trinity-Term following, the Chief Juſtice delivered the Opinion of the Court, That the Plea was good in Bar, though pleaded in Abatement, and the Defendant

dant hath Election to plead either in Bar or Abatement; the Nature of a Plea in Abatement, is to entitle the Plaintiff to a better Writ; but here the Defendant shews, that the Plaintiff hath no Cause of Action, and so it shall be take to be in Bar: And it hath been expressly resolved, That where the Plea is in Abatement, if it be of Necessity, that the Defendant must disclose Matter of Bar, he shall have his Election to take it either by way of Bar or Abatement, 2 Roll. Rep. 64. Salkil *versus* Shilton.

So where Waste was brought in the Tenet, the Tenant pleads a Surrender to the Lessor, and demands Judgment, if he should be charged in the Tenet, because it should have been in the Tenuit, and this was held a good Plea, 10 H. 7. 11. Whereupon Judgment was given for the Defendant; the Chief Justice at first doubting about the Departure, and advised the Plaintiff to waive his Demurrer, and to take Issue upon Payment of Costs.

Daws *versus* Harrison.

THe Plaintiff intitles himself as Administrator to Daws, and shews that Administration was granted to him by the Official of the Bishop of Carlisle, but did not alledge him to be Loci istius Ordinarius; And

Administration pleaded, and not *loci istius ordinarius*, good.

Jones, Serjeant, demurred to the Declaration, because it did not appear that the Official had any Jurisdiction, Pl. Com. 277. a. 31 H. 6. 13. Fitz. Judg. 35. 22 H. 6. 52. 36 H. 6. 32, 33. Sed non allocatur. For the whole Court were of Opinion, That the Declaration was good, and that he shall be intended to have Jurisdiction; but if it had been in the Case of a Peculiar, it cannot be intended that they have any Authority, unless set forth: And so Judgment was given for the Plaintiff.

Cro. Jac. 556. Palm. 97. Sid. 322.

Mason *versus* Cæsar.

IN Trespass for pulling down of Hedges, the Defendant pleads, That he had Right of Common in the Place where, &c. and that the Hedges were made upon his Common, so that he could not in ea parte enjoy his Common in tam amplo modo, &c. and so justifies the pulling them down.

Commoner may abate Hedges made upon his Common.

And they were at Issue, whether the Defendant could enjoy the Common in tam amplo modo, &c. and there was a Verdict for the

Defendant, and Judgment being ſtayed 'till moved on the other Side.

Scroggs, Serjeant, moved in Arreſt of Judgment, becauſe the Plea was ill, and the Iſſue frivolous; for 'tis impoſſible that he ſhould have Common where the Hedges are: And therefore the Defendant ought to have brought an Action upon the Caſe, or a Quod permittat. He cannot abate the Hedges, though he might have pulled down ſo much as might have opened a Way to his Common.

5 Rep. 100. 9 Rep. 55.

2 Cro. 195, 229.

The Lord hath an Intereſt in the Soil, and a Commoner hath no Authority to do any thing but to enter and put in his Beaſts, and not to throw down Quick-Set Hedges, for that is a Shelter to his Beaſts.

2 Inſt. 88.

But the Court were of Opinion, That the Defendant might abate the Hedges, for thereby he did not meddle with the Soil, but only pulled down the Erection; and the Book of 29 E. 3. 6. was expreſs in this Point. Vide 17 H. 7. 10. 16 H. 7. 8. 33 H. 6. 31. 2 Aſſ. 12. And nothing was ſaid concerning the Plea, and ſo the Defendant had Judgment.

Hocket *and his Wife, verſus* Stiddolph *and his Wife.*

Verdict cured a bad Declaration. 2 Ven. 29. 1 Ven. 93, 328.

IN an Action of Aſſault and Battery brought by the Plaintiff and his Wife, againſt the Defendant and his Wife; the Jury found quoad the beating of the Plaintiff's Wife only, that the Defendants are guilty, and quoad reſid' they find for the Defendants.

* Yelv. 106. Drury *verſus* Dennis. Sid. 376.

And it was moved in Arreſt of Judgment, by Scroggs, Serjeant, That the Declaration is not good, becauſe the Husband * joins with the Wife, which he ought not to do upon his own ſhewing; for as to the Battery made upon him, he ought to have brought his Action alone; and the finding of the Jury will not help the Declaration, which is ill in Subſtance, and thereupon Judgment was ſtayed; but being moved again the next Term, the Court were all of Opinion, That the Declaration was cured by the Verdict, and ſo Judgment was given for the Plaintiff.

Good-

Goodwin *qui tam, &c. verſus* Butcher.

AN Information was brought upon the Statute of 32 H. 8. cap. 9. made againſt Buying pretended Titles, which gives a Forfeiture of the Value of the Land purchaſed, unleſs the Seller was in Poſſeſſion within a Year before the Sale. Buying a pretended Title.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Serjeant Barrell, becauſe the Information had ſet forth the Right of theſe Lands purchaſed to be in J. S. and that the Son of J. N. had conveyed them by general Words, as deſcending from his Father; which Title of the Son, the Defendant bought; whereas, if in Truth the Title was in J. S. then nothing deſcended from the Father to the Son, and ſo the Defendant bought nothing. 2 Anderſ. 57.

Sed non Allocatur; for if ſuch Conſtruction ſhould be allowed, there could be no Buying of a pretended Title within the Statute, unleſs it was a good Title; but when 'tis ſaid, as here, That the Defendant entred and claimed Colore of that Grant or Conveyance, which was void, yet 'tis within the Statute, ſo the Plaintiff had his Judgment.

Wine *verſus* Rider *& al'.*

TReſpaſs againſt Five, Quare clauſum fregerunt, and took Fiſh out of the Plaintiff's Several and Free-Fiſhery. Traverſe immaterial.

Four of them pleaded Not Guilty, and the Fifth juſtified, for that one of the other Defendants is ſeiſed in Fee of a Cloſe adjoining to the Plaintiff's Cloſe; and that he and all thoſe, &c. have had the ſole and ſeparate Fiſhing in the River which runs by the ſaid Cloſes, with Liberty to enter into the Plaintiff's Cloſe to beat the Water, for the better carrying on of the Fiſhing; and that he as Servant to the other Defendant, and by his Command, did enter, and ſo juſtified the Taking, abſque hoc that he is guilty aliter vel alio modo.

The Plaintiff replies, That he did enter de Injuria ſua propria, abſque hoc, That the Defendant's Maſter hath the ſole Fiſhing.

The Defendant demurs; and Newdigate, Serjeant, argued for him, That the Juſtification is good, for when he had made a Ex parte Def.

2 Cro. 45, 372.

local Juſtification, he muſt traverſe both before and after, as he has done in this Caſe.

2. The Plaintiff's Replication is ill, for he ought not to have waved the Defendant's Traverſe, and force him to accept of another from him; becauſe the firſt is material to the Plaintiff's Title, and he is bound up to it, Hob. 104.

3. There was no Occaſion of a Traverſe in the Replication; for where a Servant is Defendant, de injuria ſua propria is good, with the Traverſe of the Command.

Ex parte Quer.

2 Cro. 372.

But on the Plaintiff's Side, Serjeant Baldwin held the Defendant's Traverſe to be immaterial; for having anſwered the Declaration fully in alledged a Right to the ſole Fiſhing, and an Entry into the Plaintiff's Cloſe, 'tis inſignificant afterwards to traverſe that he is Guilty aliter vel alio modo.

Then the Matter of the Plea is not good, becauſe the Defendant juſtifies by a Command from one of the other Defendants, who have all pleaded Not Guilty, and they muſt be Guilty if they did command him, for a Command will make a Man a Treſpaſſer.

Curia.

* Mires *and* Solebay, Poſt.

The Court were all of Opinion, That Judgment ſhould be given for the Plaintiff: For as to the laſt Thing mentioned, which was the Matter of the Plea, they held it to be well enough; for the * Servant ſhall not be ouſted of the Advantage which the Law gives him by pleading his Maſter's Command.

Then as to the Replication 'tis good, and the Plea is naught with the Traverſe; for where the Juſtification goes to a Time and Place not alledged by the Plaintiff, there muſt be a Traverſe of both.

In this Caſe the Defendant ought to have traverſed the Plaintiff's free Fiſhing, as alledged by him in his Declaration, which he having omitted, the Plea for that Reaſon alſo is ill, and ſo Judgment was given for the Plaintiff.

DE
Termino Paſchæ,

Anno 28 Car. II. in Communi Banco.

Lee *verſus* Brown.

IN a Special Verdict in Ejectment, the Caſe was this: viz. There were Lands which re vera were not Parcel of a Manor, and yet were reputed as Parcel. Where reputed Lands ſhall paſs under General Words.

A Grant is made of the Manor, and of all Lands reputed Parcel thereof; and whether by this Grant, and by theſe General Words, thoſe Lands would paſs which were not Parcel of the Manor, was the Queſtion.

This Term the Lord Chief Juſtice delivered the Opinion of the Court, That thoſe Lands would paſs; and they grounded their Opinions upon Two Authorities in Co. Entr. fol. 330, 384. The King *verſus* Imber & Wilkins. Poſtea. Cro. Car. 308.

If the Jury had found that the Lands in Queſtion had been reputed Parcel of the Manor, it would not have paſſed had they found no more; becauſe the Reputation ſo found might be intended a Reputation for a ſmall Time, ſo reputed by a few, or by ſuch as were ignorant and unſkilful.

But in this Caſe 'tis found, that not only the Lands were reputed Parcel, but the Reaſon why they were reputed Parcel; for the Jury have found that they were formerly Parcel of the Manor, and after the Diviſion they were again united in the Poſſeſſion of him who had the Manor, which being alſo Copyhold, have ſince been demiſed by Copy of Court-Roll, together with the Manor; and theſe were all great Marks of Reputation, and therefore Judgment was given that the Lands did well paſs, 2 Roll. Abr. 186. Dyer 350.

Wakeman

Wakeman *verſus* Blackwell.

Common Recoveries how to be pleaded.

QUare Impedit. The Caſe was, The Plaintiff entituled himſelf to an Advowſon by a Recovery ſuffered by Tenant in Tail; in pleading of which Recovery he alledges Two to be Tenants to the Præcipe, but doth not ſhew how they came to be ſo, or what Conveyance was made to them, by which it may appear that they were Tenants to the Præcipe; and after ſearch of Precedents as to the Form of Pleading of Common Recoveries, the Court inclined that it was not well pleaded, but delivered no Judgment.

Searl *verſus* Bunion.

Juſtification where good.

IN Treſpaſs for taking of his Cattle, the Defendant pleads, That he was poſſeſſed of Blackacre pro Termino Diverſorum Annorum adtunc & adhuc ventur'; and being ſo poſſeſſed, the Plaintiff's Cattle were doing Damage, and he diſtrained them Damage feaſant, ibidem, and ſo juſtifies the Taking, &c.

The Plaintiff demurs, and aſſigns ſpecially for Cauſe, That the Defendant did not ſet forth particularly the Commencement of the Term of Years, but only that he was poſſeſſed of an Acre for a Term of Years to come; and regularly where a Man makes a Title to a particular Eſtate, in pleading he muſt ſhew the particular Time of the Commencement of his Title, that the Plaintiff may reply to it.

Curia.

The Chief Juſtice, and the whole Court held, That the Plea was good upon this Difference, where the Plaintiff brings an Action for the Land, or doing of a Treſpaſs upon the Land, he is ſuppoſed to be in Poſſeſſion; but if he will juſtify by Vertue of any particular Eſtate, he muſt ſhew the Commencement of that Eſtate, and then ſuch Pleading as here will not be good.

* Yelv. 75. Cro. Car. 138. Con. Lut. 1492.

But when the Matter is * collateral to the Title of the Land, and for any thing which appears in the Declaration the Title may not come in Queſtion, ſuch a Juſtification as this will be good.

In this Caſe no Man can tell what the Plaintiff will reply; 'tis like the Caſes of Inducements to Actions, which do not require ſuch Certainty as is neceſſary in other Caſes.

So

So where an Action is brought for a Nuſance, and he intitles himſelf generally, by ſaying he is Poſſeſſionat' pro Termino Annorum, 'tis well enough, and he need not to ſet forth particularly the Commencement, becauſe he doth not make the Title his Caſe; for which Reaſon, Judgment was given for the Defendant.

Croſier *verſus* Tomlinſon *Executor.*

IN an Action on the Caſe, the Plaintiff declared, That the Defendant's Teſtator being in his Life-time (viz. ſuch a Day) indebted to the Plaintiff in the Sum of 20 l. for ſo much Money before that Time to his Uſe had and received, did aſſume and promiſe to pay the ſame when he ſhould be thereunto required; and that the Teſtator did not in his Life-time, nor the Defendant ſince his Death, pay the Money, though he was thereunto required.

Statute of Limitations of Perſonal Actions extends to *Indebitatus Aſſumpſit.*

The Defendant pleads, That the Teſtator did not at any Time within Six Years make ſuch Promiſe.

The Plaintiff replies, That he was an Infant at the Time of the Promiſe made, and that he came not to full Age till the Year 1672. and that within Six Years after he attained the Age of One and twenty Years he brought this Action, and ſo takes Advantage of the Promiſe in the Statute of * Limitations, that the Plaintiff ſhall have Six Years after the Diſability by Infancy, Coverture, &c. is removed.

* 21 Jac. c. 16.

And the Defendant demurred by Serjeant Rigby; and the Reaſon of his Demurrer was, becauſe in the ſaid Proviſo Actions on the Caſe on Aſſumpſit are omitted.

Ex parte Def.

This Act was made for quieting of Eſtates, and avoiding of Suits, as appears by the Preamble, and therefore ſhall be taken ſtrictly; there is an Enumeration of ſeveral Actions in the Proviſo, and this is Caſus omiſſus, and ſo no Benefit can be taken of the Proviſo.

In a Writ of Error upon a Judgment brought 4 Car. 1. in the Court of Windſor, the Judges held, That an Action on the Caſe for * ſlandering of a Man's Title is out of this Act, becauſe ſuch an Action was rare, and not brought without Special Damages: But Hide, Chief Juſtice, doubted, 1 Cro. 141.

* Cro. Car 163, 513, 535. Debt upon Eſcape is out of the Statute, 1 Sand. 37. But an Action for Eſcape is not, Sid. 305.

The Law-Makers could not omit this Caſe unadviſedly, becauſe 'tis within thoſe Sorts of Actions enumerated by this Act.

This Promiſe was made to the Plaintiff when he was but a Day old, and it would be very hard, now after ſo many Years, to charge the Executor.

So is Debt for not ſetting out of Tythes; for theſe are not grounded upon any Contract. Cro. Car. 513. Hut. 109.

But

Ex parte Quer.

But Turner, Serjeant, argued, That though an Indebitat' Aſſumpſit is not within the expreſs Words of the Proviſo, yet 'tis within the Intent and Meaning thereof; and ſo the Rule is taken in 10 Co. 101. in Bewſage's Caſe, Quando verba ſtatuti ſunt ſpecialia, ratio autem generalis, ſtatutum intelligendum eſt generaliter.

And this is a Statute which gives a General Remedy, and the Miſchief to the Infant is as great in ſuch Actions of Indebitatus Aſſumpſit, as other Actions; and therefore 'tis but reaſonable to intend, that the Parliament which have ſaved their Rights in Debts, Trovers, &c. intended likewiſe, that they ſhould not be barred in an Indebitatus Aſſumpſit.

In 2 Anderſ. 55. Smith *verſus* Colſhil: Debt was brought upon a Bond; the Defendant there pleaded the Statute of the 5 E. 6. of Selling of Offices; the Words of which are, viz. That every Bond to be given for Money or Profit for any Office, or Deputation of any Office mentioned in the Statute, ſhall be void againſt the Maker. In that Caſe the Bond was given to procure a Grant of the Office, and alſo to exerciſe the ſame: Now though this was not within the expreſs Words of the Statute, yet the Bond was held void; and if it ſhould be otherwiſe, the Miſchiefs which the Statue intended to remedy would ſtill continue; and therefore the Intent of the Law-Makers in ſuch Caſes is to be regarded; for which Reaſon, if Actions of Indebitatus Aſſumpſit are within the ſame Miſchief with other Actions therein mentioned, ſuch alſo ought to be conſtrued to be within the ſame Remedy.

2 Anderſ. 123, 150. Cro Car. 533 19 H. 8. 11.

* Cro. Car. 245.

But he took the Caſe of * Swain *verſus* Stephens to rule this Caſe at Bar, in which Caſe this very Statute was pleaded to an Action of Trover, and the Plaintiff replied, That he was beyond Sea; and upon a Demurrer to the Replication, the Court held Trover to be within the Statute, it being named in the Paragraph of Limitation of Perſonal Actions, which directs it to be brought within the Time therein limited; that is to ſay, all Actions on the Caſe within Six Years; and then enumerates ſeveral other Actions, amongſt which Trover is omitted, yet the Court were then of Opinion, that Trover is implied in thoſe General Words.

Curia. 2 Sand. 120.

And of that Opinion was the Chief Juſtice, and Wyndham and Atkins, Juſtices, That upon the whole Frame of the Act, it was ſtrong againſt the Defendant; for it would be very ſtrange that the Plaintiff in this Caſe might bring an Action of Debt, and not an Indebitatus Aſſumpſit.

When

When the Scope of an Act appears to be in a general Sense, the Law looks to the Meaning, and is to be extended to particular Cases within the same Reason; and therefore they were of Opinion, That Actions of Trespass, mentioned in the Statute, are comprehensive of this Action, because 'tis a Trespass upon the Case, and the Words of the Proviso save the Infants Right in Actions of Trespass.

And therefore, though there are not particular Words in the enacting Clause, which relate to this Action, yet this Proviso restrains the Severity of that Clause, and restores the Common Law, and so is to be taken favourably; and this Action being within the same Reason, with other Actions therein mentioned, ought also to be within the same Remedy.

But Justice Ellis doubted, Whether Actions of Trespass could comprehend Actions on the Case; and that when the Parliament had enumerated Actions of Trepass, Trover, Case for Words, &c. if they had intended this Action, they would have named it; he said he was for restoring the Common Law as much as he could, but doubted much, whether this Proviso did help the Plaintiff: But Judgment was given for the Plaintiff.

Doctor Samways *versus* Eldsly.

COvenant. The Plaintiff declares, That by Indenture made between him and the Defendant, reciting that there were divers Controversies between them, as well concerning the Right, Title and Occupation of Tythes arising and renewing upon the Freehold of the Defendant in T. and upon other Lands held by the Defendant, by a Lease for Years from the Plaintiff, under the Annual Rent of, &c. and concerning the Arrearages of Rent due upon that Demise, as concerning other Matters; for the Determination thereof, the said Parties did by the said Indenture bind themselves, in Consideration of 12 d. given to each other, to observe the Arbitration of an Arbitrator, indifferently to be chosen between them, to arbitrate, order and judge between them de & super Præmissis; and the Plaintiff and Defendant mutually covenanted to do several other Matters. Where Covenants are mutual, and where not.

That the Arbitrator did thereupon afterwards award, and the Defendant did covenant with the Plaintiff, That in Consideration of the Plaintiff's sealing and delivering (at the Defendant's Re-

queſt) one Part of a Leaſe for Years (to the Award mnexed) for the Rent therein reſerved, That the Defendant ſhould pay ſo much Mony for the Tythes.

That it was alſo awarded by the ſaid Arbitrator, and the Defendant did covenant, that he would be accountable to the Plaintiff for all ſuch Arrearages of Rent, Tythes, and Compoſition-Mony for Tythes, as ſhould be ariſing and renewing upon the ſaid Land, &c. according to ſuch a Value per Annum, whereof the Defendant could not lawfully diſcharge himſelf.

And the Plaintiff avers, That he hath obſerved all the Covenants on his Part, and that the Defendant hath not obſerved all the Covenants on his Part, and aſſigns for Breach, That he hath not accounted with him for all Arrears of Tythes and Compoſition-Mony for Tythes ariſing upon the Lands in, &c. and that he hath requeſted him to account, which he hath refuſed.

The Defendant pleads Actio non: For he ſays, That 'tis true there was ſuch an Indenture as in the Declaration is ſet forth, and ſuch a Covenant to be accountable as the Plaintiff hath declared.

But ſaith in eadem Indentura agreatum fuit ulterius & proviſum, That the Plaintiff ſhould allow and diſcount upon the Account, all Sums of Mony for Parſons Dinners at the Requeſt of the Plaintiff, and for his Concerns laid out and diſburſed by the Defendant, and ſuch other Sums which he had Direction to lay out; and that ſuch a Day paratus fuit & obtulit ſe & adhuc paratus eſt, to account for all Arrears of Rent, &c. if the Plaintiff would diſcount, &c.

That ſuch a Day the Plaintiff would not, and often after refuſed, and yet doth refuſe to allow upon ſuch Account all ſuch Sums of Mony as the Defendant, at the Requeſt and for the Concern of the Plaintiff, had laid out, and this he is ready to aver; and then he avers, that after, &c. on ſuch a Day he did expend ſeveral Sums of Mony for the Plaintiff, which were juſt and reaſonable to be allowed by the Plaintiff, upon Account made by him.

To this Plea the Plaintiff demurres, and the Defendant joined in Demurrer, which was argued by Turner Serjeant for the Plaintiff, and by Serjeant Seys for the Defendant.

Ex parte Quer. This was a bad Plea, for 'tis a Rule in all Law Books, That every Plea ought to anſwer the Matter which is charged upon the Defendant in the Declaration, which is not done here, be-

becauſe the Defendant doth neither aver that he did account, or confeſs, or avoid or traverſe it, which he ought to do, after the Plaintiff had alledged a Requeſt to account, and a Refuſal.

'Tis an abſolute Covenant which charges him to be accountable; and not if the Plaintiff would allow Parſons Dinners, &c. for 'tis impoſſible that the Plaintiff can make any ſuch Allowance, till the Defendant hath accounted; for how can there be a diſcounting without an Account?

If the Plaintiff had told him before the Account, That he would not allow any Thing upon the Account; this would not have been prejudicial to bar him of his Action, ſo as it had been before the Requeſt: For if a Man makes a Feoffment in Fee, upon Condition that if the Feoffor pay 100 l. at Michaelmas, the Feoffment ſhall be void; and before Michaelmas the Feoffee tells him, that he will not receive the Mony at that Time; this ſhall not prejudice him, becauſe 'tis no Refuſal in Law.

The Defendant in this Caſe is to do the Firſt Act, viz. to account; and when that is neglected by him, it ſhall never prejudice him who is to do a ſubſequent Act, 5 Co. 19, 20. Higginbottom's Caſe, 22 & 23 Hallin and Lamb's Caſe.

One covenants to make an Eſtate in Fee at the Coſts of the Covenantee; the Covenantor is to do the Firſt Act, viz. to let him know what Conveyance he will make.

The like Caſe was in this Court between Twiford and Buckly, upon an Indenture of Covenants, wherein One of the Parties did covenant to make a Leaſe for the Life of the Covenantee, and for Two other Lives as he ſhould name, and the Covenantor was to give Poſſeſſion.

The Breach aſſigned was, That the Defendant had not made Livery and Seiſin, and upon Performance pleaded, the Plaintiff did demur, and upon great Debate it was reſolved that the Covenant was not broken, becauſe the Plaintiff had not performed that which was firſt to be done on his Part, viz. to name the Lives.

It may be objected, That theſe Covenants have a Relation one to the other; and ſo Non-performance of the one, may be pleaded in Bar to the other.

But to that he anſwered, They are diſtinct and mutual Covenants, and there may be ſeveral Actions brought againſt each other. The Caſe of * Ware and Chappel comes up to this Point. Ware was to raiſe 500 Soldiers, and bring them to ſuch a Port, and Chappel was to find Shipping, for which he ſued upon the Covenant, though the other had not raiſed the Soldiers; for that can be only alledged in mitigation of Damages, and is

* Stiles 186, 187.

no Excuse for the Defendant, and it was adjudged that this was not a Condition precedent, but distinct and mutual Covenants, upon which several Actions might be brought.

This cannot be a Condition precedent, for the Defendant pleads, & ulterius agreat' & provisum est, that the Plaintiff shall discompt and reimburse the Defendant; and here the Word provisum est doth not make a Condition, but a Covenant, 27 H. 8. 14, 15. Bro. Condition 7.

There is another Fault in the Plea; for the Defendant avers, that the Plaintiff hath not reimbursed him several Sums of Mony, which is altogether incertain, for it doth not appear what is due, 28 H. 8. Dyer 28. 9 Ed. 4. 16. 12 H. 8. 6. a.

Ex parte Def. But it was argued for the Defendant, that he need not traverse the Accompt.

As to the First Objection made, That the Plea is not good, because it doth not answer the Declaration, the Rule as to that Purpose is generally good; but then the Plaintiff must tell all his Case, which if he omits, he must then give the Defendant Leave to tell where his Omission is.

Sometimes a Thing which belongs properly to another, may be pleaded in Bar or Discharge, to avoid circuity of Actions; as one Covenant may be pleaded to another, 1 H. 7. 15. 20 H. 7. 4. So where the Lessee is to be dispunishable of Waste, he may plead it to a Writ of Waste.

The Books note a Difference where the Covenant is One or Two Sentences; for in the First Case, one Covenant may be pleaded in Discharge of another, but not in the last, Keilway 34.

'Tis true, if the Second Covenant had been distinct and independent, it could not have been thus pleaded; but in this Case 'tis not said, That the Covenantor for himself, his Executors and Administrators, doth covenant, &c. but ulterius agreat' & provisum est; so that as 'tis penned, provisum est makes a Condition, and then the Sense is, I will accompt, if you will discompt; and if you refuse to discompt, I cannot be charged, Dyer 6.

'Tis inutilis labor to make up an Accompt, If the other will not allow what he ought, if there be an Annuity pro consilio impenso &c. and he will not pay the Mony, the other is not to be compelled to give his Advice, Fitzh. Annuity 27. 25 E. 2. Annuity 44.

Curia. The Chief Justice and the whole Court were of Opinion, That Judgment should be given for the Plaintiff; for Arbitrations, Wills, and Acts of Parliament, are to be taken according to the Mean-

Meaning of the Parties, and Damages are to be given according to the Merit of the Caſe. In this Caſe the Defendant is bound to accompt upon Requeſt, and to pay what Mony is due upon the Accompt; and 'tis an Impertinent Queſtion for the Defendant to ask him to make Allowance for Parſons Dinners before they come to Accompt: 'Tis as if a Bayliff ſhould ſay to his Lord, I have laid out ſo much Mony, and I will not accompt with you unleſs you will allow it; this is a Capitulation beforehand, and is very inſignificant by Way of Diſcharge.

They have each a Remedy upon theſe mutual Covenants, and the proviſum & agreat' eſt doth not amount to a Condition, but is a Covenant; and Judgment was given accordingly.

Juſtice Ellis ſaid, he had a Manuſcript Report of the Caſe of Ware *and* Chappel, which he ſaid was adjudged upon great Debate.

Stoutfil's Caſe.

PRohibition. It was agreed clearly that no Tythes ought to be paid for Brick, becauſe 'tis Part of the Soil, and ſo it has been often adjudged: And it was alſo ſaid that Tythes ſhall not be paid for Pidgeons, unleſs it be by ſpecial Cuſtom.

Tythes not to be paid for Brick or Pidgeons. 1 Mod. 35.

Columbel *verſus* Columbel.

THE Plaintiff brought an Action of Debt upon a Bond of 500 l. The Defendant demands Oyer of the Bond and Condition, which was to obſerve an Award of A. B. Arbitrator, indifferently choſen to determine all Manner of Controverſies, Quarrels and Demands, concerning the Title of certain Lands, ſo as the ſaid Award were made and put into Writing under the Hand and Seal of the Arbitrator, &c. and then he pleads, that the Arbitrator made no Award.

Award pleaded under Seal and not under Hand not good.

The Plaintiff replies an Award, by which ſuch Things were to be done, and ſets it forth (in hæc verba) under the Seal of the Arbitrator.

The Defendant rejoins, that the Arbitrator made no Award under his Hand and Seal according to the Condition of the Bond.

The Plaintiff demurs; for that the Defendant ought to plead the Award under the Hand as well as the Seal of the Arbitrator; for

for when he produces it in Court, as he doth by a profert hic in Curia, he must plead it formally, as well as produce it; and Judgment was given for the Plaintiff.

Norris *versus* Trist.

Livery *secundum formam Chartæ*, where good.

IN a Special Verdict in Ejectment: The Case was, A Deed is made to Three, Habendum to Two for their Lives, Remainder to the Third for his Life, and Livery and Seisin is made to all Three secundum formam Chartæ.

And whether the Livery so made, as if they had all Estates in Possession, whereas in truth One of them had but an Estate in Remainder, was good, was the Question.

On the one Side it was said by Serjeant Seys, That Possession in this Case was delivered according to the Form of the Deed within mentioned, which must be to Two for Life, Remainder to the Third Person, and Livery and Seisin being only to accomplish and perfect the Common Assurances of the Land, ought to be taken favourably, ut res magis valeat quam pereat; and therefore if a Feoffment be made of Two Acres, and a Letter of Attorney to give Livery, and the Attorney only enters into One Acre, and gives Livery secundum formam Chartæ, both the Acres pass, Coke Litt. 52. a.

Dyer 131. 40.

But on the other Side, Serjeant Maynard said, That there was something more in this Case than what had been opened; for there was a Letter of Attorney made to give Livery to Two, and instead of doing that, he makes Livery to them all, which is no good Execution of his Authority, and therefore no Livery was made, the Authority not being pursued.

As to the Case in the First Institutes, my Lord Coke errs very much there in that Discourse; for in saying, That if there be a Feoffment of Two Acres, and a Letter of Attorney to take Possession of both, and he maketh Livery of both, but taketh Possession but of one, and that both pass, 'tis not Law; but if the Authority be general, as to make Livery and Seisin, and he take Possession of one, and then makes Livery of more secundum formam Chartæ, that is good; and this is the Difference taken in the Books, 5 Ed. 3. 65. 3 Ed. 3. 32. 43 Ed. 3. 32. 27 H. 8. 6.

The Remainder-Man in this Case is a meer Stranger to the Livery.

There

There is alſo a manifeſt Difference between a Matter of Intereſt, and an Execution of an Authority; for in the Firſt Caſe, it ſhall be conſtrued according to the Intereſt which either hath, but an Authority muſt be ſtrictly purſued.

The Court were all of Opinion, that the Livery in this Caſe was good to Two for their Lives, Remainder to the Third Perſon. And the Chief Juſtice ſaid, That whatever the ancient Opinions were about purſuing Authorities with great Exactneſs and Nicety, yet this Matter of Livery upon Endorſements of Writing was always favourably expounded of later Times, unleſs where it plainly appeared that the Authority was not purſued at all; as if a Letter of Attorney be made to Three jointly and ſeverally, Two cannot execute it, becauſe they are not the Parties delegated, they do not agree with the Authority: And Judgment was given accordingly. Curia. Sid. 428.

Richards *verſus* Sely.

THIS was a Special Verdict in Ejectione firmæ, for Lands in the County of Cornwal: The Caſe was this; viz.

Thomas Sely was ſeiſed of the Lands in Queſtion for Life, according to the Cuſtom of the Manor of P. and he together with one Peter Sely were bound in a Bond to a Third Perſon for the Payment of 100 l. being the proper Debt of the ſaid Thomas, who gave Peter a Counter-bond to ſave himſelf harmleſs.

And that Thomas being ſo ſeiſed, did execute a Deed to Peter as a Collateral Security to indempnifie him for the Payment of this 100 l. by which Deed after a Recital of the Counter-bond given to Peter, and the Eſtate which Thomas had in the Lands, he did covenant, grant and agree for himſelf, his Executors, Adminiſtrators and Aſſigns, with the ſaid Peter, that he, his Executors and Adminiſtrators, ſhould hold and enjoy theſe Lands from the Time of the making the ſaid Deed for Seven Years, and ſo from the End of Seven Years to Seven Years, for and during the Term of 49 Years, if Thomas ſhould ſo long live. 2 Cro. 301.

In which Deed there was a Covenant, That if the ſaid 100 l. ſhould be paid, and Peter ſaved harmleſs according to the Condition of the ſaid Counter-bond, then the ſaid Deed to be void.

The Queſtion was, Whether this being in the Caſe of Copyhold Lands will amount to a Leaſe thereof, and ſo make a Forfeiture of the Copyhold Eſtate, there being no Cuſtom to warrant it?

Covenant made to enjoy a Copyhold *de Anno in Annum*, 'tis a Leaſe, and ſo a Forfeiture.

This

Ex parte Quer.

This Case was argued this Term by Serjeant Pemberton for the Plaintiff; and in Trinity Term following by Serjeant Maynard on the same Side, who said that this was not a good Lease to entitle the Lord to a Forfeiture. It hath been a general Rule, that the Word Covenant will make a Lease, though the Word Grant be omitted; nay a Licence to hold Land for a Time without either of those Words will amount to a Lease, much more when the Words are, To * have, hold and enjoy his Land for a Term certain; for those are Words which give an Interest, and so it hath been ruled in Tisdale *and Sir* William Essex's Case, which is reported by several, and is in Hob. 35. and 'tis now settled that an Action of Debt may be brought upon such a Covenant.

* 2 Cro. 92. 398. Noy 14. 1 Roll. Abr. 848, 849. Cro. Car. 207.

And all this is regularly true in the Case of a Freehold: But if the construing of it to be a Lease will work a Wrong, then 'tis only a Covenant or Agreement, and no Interest vests, and therefore it shall never be intended a Lease in this Case, because 'tis in the Case of a Copyhold Estate; for if it should, there would be a Wrong done both to the Lessor and Lessee; for it would be a Forfeiture of the Estate of the one, and a Defeating of the Security of the other.

It has been generally used in such Cases, to consider what was the Intention of the Parties, and not to intend it a Lease against their Meaning, for which there is an express Authority, 2 Cro. 172. in the Case of Evans *and* Thomas, in which Howel covenants with Morgan to make a Conveyance to him of Land by Fine, provided that if he pay Morgan 100 l. at the End of Thirteen Years, that then the Use of the Fine shall be to the Cognisor, and covenants that Morgan shall enjoy the said Lands for Thirteen Years, and for ever after if the 100 l. be not paid.

Noy 128.

The Assurance was not made, and this was adjudged no Lease for Thirteen Years, because it was the Intent of the Parties to make an Assurance only in the Nature of a Mortgage, which is but a Covenant.

And this appears likewise to be the Intention of the Parties here, because in the very Deed 'tis recited that the Lands are Copyhold.

It also sounds directly in Covenant, for 'tis that Peter shall or may enjoy without the lawful Let or Interruption of the Lessor.

All Agreements must be construed secundum subjectam materiam if the Matter will bear it, and in most Cases are governed by the Intention of the Parties, and not to work a Wrong; and therefore if Tenant in Tail makes a Lease for Life, it shall be taken for his own Life; and yet if before the Statute of Entails he made such Lease,

Lease, he being then Tenant in Fee-Simple, it had been an Estate during the Life of the Lessee; but when the Statute had made it unlawful for him to bind his Heir, then the Law construes it to be for his own Life, because otherwise it would work a Wrong, Co. Litt. 42. Hob. 276.

So in this Case it shall not amount to a Lease for the manifest Inconvenience which would follow, but it shall be construed as a Covenant, and then no Injury is done.

On the Defendant's Part it was argued by Serjeant Newdigate, that though this was in the Case of a Copyhold, that did not make any Difference; for the plain Meaning of the Parties was to make a Lease: But where the Words are doubtful, and such as may admit of divers Constructions, whether they will amount to a Lease or not, there they shall be taken as a Covenant to prevent a Forfeiture. Ex parte Def.

So also if they are only Instructions, as if a Man by Articles sealed and delivered is contented to demise such Lands, and a Rent is reserved, and Covenants to repair, &c.

Or if One covenants with another to permit and suffer him to have and enjoy such Lands, these and such like Words will not amount to a Lease, because (as hath been said) the Intention of the Parties is only to make it a Covenant; but here the Words are plain, and can admit of no Doubt. 1 Roll. Abr. 848.

But for an Authority in the Point, the Lady * Mountague's Case was cited, where it was adjudged, That if a Copyholder make a Lease for a Year warranted by the Custom, & sic de Anno in Annum during Ten Years, 'tis a good Lease for Ten Years, and a Forfeiture of the Copyhold Estate, Vide Hill. 15 & 16 Car. 2. Rot. 233. the Case of Holt *and* Thomas in this Court. * 2 Cro. 301.

The Court inclined, That it was a good Lease, and by consequence a Forfeiture of the Copyhold, and that a Licence in this Case could not be supposed to prevent the Forfeiture, because if that had been, the Jury would have found it, the Meaning of the Parties must make a Construction here, and that seems very strong that 'tis a good Lease; but they gave no Judgment. Curia -

Wilkinſon *verſus Sir* Richard Lloyd.

Where the Parties ſhall join in an Action, where not.

THe Defendant covenanted, that he would not agree for the taking the Farm of the Excile of Beer and Ale for the County of York without the Conſent of the Plaintiff and another, and the Plaintiff alone brought this Action of Covenant, and aſſigns for Breach, the Defendant's agreeing for the ſaid Excile without his Conſent, upon which the Plaintiff had a Verdict, and 1000l. Damages given.

And Serjeant Pemberton moved in Arreſt of Judgment, for that an Action of Covenant would not lie in this Caſe by the Plaintiff alone, becauſe he ought to have joined with the other, both of them having a joint Intereſt, and ſo is Slingsby's Caſe, 5 Co. If a Bond is made to Two jointly and ſeverally, they muſt both join in an Action of Debt, ſo here 'tis a joint Contract, and both muſt be Plaintiffs: So alſo if One covenants with Two to pay each of them 20l. they muſt both join.

'Tis true, in Slingsby's Caſe 'twas held, if an Aſſurance is made to A. of White-Acre, and to B. of Black-Acre, and to C. of Green-Acre, and a Covenant with them and every of them; theſe laſt Words make the Covenant ſeveral.

But here is nothing of a ſeveral Intereſt, no more than that One covenants with Two, that he will not join in a Leaſe without their Conſent, ſo that their Intereſt not being divided the Covenant ſhall be entire, and taken according to the firſt Words to be a joint Covenant; and the rather, becauſe if the Plaintiff may maintain this Action alone, the other may bring a Second Action, and the Defendant will be ſubject to entire Damages which may be given in both.

Judgment

But the Court was of another Opinion, That here was no joint Intereſt; but that each of the Covenantees might maintain an Action for his particular Damages, or otherwiſe one of them might be Remedileſs; for ſuppoſe one of them had given his Conſent that the Defendant ſhould farm this Excile, and had ſecretly received ſome Satisfaction or Recompence for ſo doing, is it reaſonable that the other ſhould loſe his Remedy who never did conſent? For which Reaſon the Plaintiff had his Judgment.

Page *verſus* Tulſe *Mil' & alios Vic'* Midd'.

THE Plaintiff brought an Action on the Caſe againſt the Sheriff for a falſe Return, ſetting forth, That he ſued a Capias out of this Court directed to the Sheriff of Middleſex, by vertue whereof he arreſted the Party, and took Bail for his Appearance, and at the Day of the Return of the Writ the Sheriff returned Cepi Corpus & paratum habeo, but he had not the Body there at the Return of the Writ, but ſuffered him to eſcape.

Caſe lies not againſt the Sheriff for returning a *Cepi Corpus & paratum habeo*, tho' the Party doth not appear Mod. Rep. 239. Ellis *and* Yarborough, poſt.

The Defendant pleads the Statute of 23 H. 6. cap. 10. and ſaith that he took Bail, viz. Two ſufficient Sureties, and ſo let him go at large, &c.

The Plaintiff demurs; and whether this Action lies againſt the Defendant was the Queſtion, who refuſed to proceed againſt him by way of Amerciament, or to take an Aſſignment of the Bail-Bond.

This Caſe depended in Court ſeveral Terms. It was argued by Serjeant Pemberton and Serjeant Coniers for the Plaintiff, and by Serjeant George Strode for the Defendant; and Judgment was given in Eaſter-Term in the 29th Year of this King.

In the Argument for the Defendant that this Action would not lie, it was conſidered, Ex parte Def.

1. What the Common Law was before the making of this Statute.

2. What Alteration thereof the Statute had made.

At the Common Law Men were to appear perſonally to anſwer the Writ, the Form of which required it, and no Attorney could be made in any Action 'till Edw. 1. de gratia ſpeciali gave Leave to his Subjects to appoint them, and commanded his Judges to admit them, 2 Inſt. 377. After the Arreſt the Sheriff might tie the Party to what Conditions he pleaſed, and he might keep him 'till he had complied with ſuch Conditions, which often ended in taking extravagant Bonds, and ſometimes in other Oppreſſions, for Remedy whereof the Statute was made, in which the Clauſe that concerns this Caſe is, viz. If the Sheriff return upon any Perſon *Cepi Corpus* or *Reddidit ſe*, that he ſhall be chargeable to have the Body at the Day of the Return of the Writ in ſuch Form as before the making the Act; ſo that as to the Return of the Writ this Statute hath made no Alteration, the Sheriff being bound to have the Party at a Day as before.

All the Alteration made of the Common Law by this Statute is, That the Sheriff now is bound to let the Party out of Priſon upon reaſonable Sureties of ſufficient Perſons, which before he was not obliged to do; and it would be a Caſe of great Hardſhip upon all the Sheriffs of England, if they (being compellable to let out the Party to Bail) ſhould alſo be ſubject to an Action for ſo doing, becauſe they have him not at the Day; ſo that the Intent of the Law muſt be (when it charges the Sheriff to have the Body at the Return) that he ſhould be liable to a Penalty if the Party did not then appear, not to be recovered by Action, but by Amerciament.

Cro. Jac. 286. The Security directed by this Act is to be taken in the Sheriff's own Name; tis properly his Buſineſs and for his own Indempnity, and therefore it is left wholly in his Power; for which Reaſon no Action will lie againſt him for taking inſufficient Bail, that being to his own Prejudice, in which the Plaintiff is no wiſe concerned; for if that had been intended by the Act, ſome Proviſion would have been made as to his being ſatisfied in the ſufficiency of the Perſons.

When the Security is thus taken, if the Defendant doth not appear at the Return of the Writ, the Plaintiff by Amerciaments ſhall compel him to bring in the Body, or to aſſign the Bond, either of which is a full Satisfaction, and as much as is required.

*2 Sand. 59, 154. 1 Roll. Abr. 807, 808. Cro. Eliz. 400, 852. Noy 39. Moor 428. Sid. 23. If the Sheriff refuſe to take * ſufficient Sureties when offered, he is liable to an Action on the Caſe at the Suit of the Defendant for his Refuſal; and it would be very unreaſonable to enforce him to have the Party in Court at the Return, when he is obliged under a Penalty to let him at large.

This Action is grounded upon a falſe Return, when in truth there is no Return made, or if any, 'tis a very imperfect Return 'till the Body be in Court; and this is the Reaſon why the Court will not allow it, but amerce the Sheriff 'till he make the Party appear; 'tis not like a compleat Return, as a Non eſt inventus, or the Return of Nulla Bona upon a Fi' Fa'.

* 1 Roll. Abr. 93. pl. 17. Poſtea. The Caſe of * Bowls and Laſſels is full in the Point, where it was adjudged that this Action would not lie, becauſe the Sheriff had not done any Thing unjuſtly, but what he was commanded to do by the Statute, and therefore he is to be amerced if the Defendant doth not appear.

Ex parte Quer. But for the Plaintiff it was ſaid, That unleſs this Action lie he is Remedileſs, and that for Two Reaſons:

1. Becauſe the Aſſignment of the Bail-Bond is at the Diſcretion of the Court, and not demandable by the Plaintiff in foro.

2. The

2. The Plaintiff hath no Benefit by the Amerciaments, becauſe they go to the King, and in ſome Places are granted to Patentees; now 'tis agreed that the Sheriff may be amerced, and certainly if an Action be brought againſt him he is but in the ſame Caſe, for ſtill he is to pay: And if it be objected, that the Amerciaments may be compounded cheaper, then the Plaintiff hath not ſo good Remedy, nor is ſo likely to recover his Debt, as if the Action would lie, which would be a greater Penalty upon him than the Amerciaments on the Sheriff.

Neither will it follow, that becauſe the Sheriff may be amerced, therefore no Action will lie againſt him; for in many Caſes he may be amerced, and yet an Action on the Caſe will lie againſt him at the Suit of the Party, 41 Aſſ. pl. 12. fol. 254. Latch 187.

That this Action will not lie is againſt the very End of the Statute, and the reaſonable Conſtruction thereof in the laſt Clauſe, which enacts, That if the Sheriff return a *Cepi Corpus*, he ſhall be charged to have the Body at the Return as before the making of the Statute; now before this Law he was liable to an Action, if after ſuch a Return made the Party did not appear, and therefore this Action being grounded upon the Common Law, is ſtill preſerved, ſince no Alteration hereof hath been made by this Statute.

'Tis true, an Action of Eſcape is taken away, but not an Action on the Caſe for a falſe Return, and upon this Difference are all the Authorities cited on the other Side, as Cro. Eliz. 416, 621. Cro. Jac. 286. Moor 428. and the Caſe of Bowls and Laſſels.

And for an Authority in Point is the Caſe of Franklin and Andrews, 24 Car. 1. where Judgment was given for the Plaintiff in an Action brought for a falſe Return of Cepi Corpus; and the Statute pleaded as in this Caſe. It has been objected, that Judgment was there given upon the Defect of Pleading, becauſe the Traverſe was naught; 'tis true, there was a Traverſe, abſque hoc quod the Defendant retornavit aliter vel alio modo; but that was held good, becauſe it anſwered the falſo alledged in the Plaintiff's Declaration: In this Caſe there is no Traverſe, but 'tis confeſſed by the Demurrer that he did falſly and deceitfully return Cepi Corpus, and ſo the Plaintiff is at apparent Damage, and hath no Remedy without this Action, and the Defendant is at no Prejudice, but hath his Remedy over on the Bail-Bond.

North Chief Juſtice, Wyndham and Atkins Juſtices, held, that the Action would not lie; for when the Sheriff returns Cepi Corpus & paratum habeo, though he have him not in Court, 'tis no Judgment.

no false Return; for if he hath taken Bail, he hath done what by Law he ought to do; if he arrest a Man in Yorkshire, the Law will not compel him to bring the Party hither to the Bar, because of the Charge; if he make an insufficient Return, neither the Party or the Court are deluded, because the common Method in such Cases must be pursued, by which the Party will have Remedy. This Return is true; and Justice Atkins held, that the Sheriff was not obliged by the Statute to return only a Cepi Corpus & paratum habeo, but might return, that he took Bail; for the Statute provides, that if he return a Cepi Corpus, he shall be chargeable as before, but doth not enjoin him to make such Return; the Case of Bowles and Lassels is full in this Point, and therefore Judgment was given for the Defendant.

But Justice Scroggs was of another Opinion; says he, This Action being brought because the Defendant said he had the Body ready, when in truth he had not, was an apparent Injury to the Plaintiff, of whom the Statute must have some Consideration; for it doth not require the Sheriff to say Cepi Corpus & paratum habeo, but he must make his Return good, or otherwise those Words are very insignificant; and if the Statute obliges him to let the Party to Bail, and nothing more is thereby intended for the Benefit of the Plaintiff, why doth the Court amerce the Sheriff, and punish him for doing what the Statute directs? Therefore if the Plaintiff brings a Habeas Corpus upon the Cepi, and the Defendant doth not appear, the Plaintiff is then well entituled to this Action.

Hollis *versus* Carr, *in Cancellaria.*

Decree of the Execution of a Fine in Specie.

THE Lord Chancellor Finch having called to his Assistance Justice Wild and Justice Windham, to give their Opinions what Relief the Plaintiff was to have for the recovering of 6000 l. which was his Lady's Portion. After those Judges had spoken shortly to the Matter, he put the Case: Viz. The Plaintiff by his Bill demands 6000 l. due to him for his Wife's Portion, with Interest for Non-payment, according to the Purport of certain Articles of Agreement, dated in August 1661. and mentioned to be made between old Sir Robert Carr (the Defendant's Father), his Lady and Son (the now Defendant), and Lucy Carr his Daughter, on the one Part, and my Lord Hollis and Sir Francis his Son (the now Plaintiff) on the other Part.

The

The Articles mention an Agreement of a Marriage to be had between the ſaid Sir Francis Hollis and Lucy Carr, with Covenants on the Plaintiff's Side to ſettle a Jointure, &c. and on the other Side to pay 6000 l. and 'tis agreed in the Articles, that a Fine was intended to be levied of ſuch Lands, &c. for ſecuring the Payment of 6000 l. &c.

The Marriage takes Effect, but old Sir Robert Carr did never ſeal theſe Articles; the Lady Carr ſeals before, and the Defendant after Marriage.

Sir Francis had Iſſue on his Lady Lucy, one Child ſince dead; the Lady is likewiſe dead; the Jointure was not made, nor the Portion paid.

Afterward, viz. Anno 1664. an Act of Parliament was made for ſettling old Sir Robert Carr's Eſtate, whereby the Truſtees therein named are appointed to ſell it for Payment of Debts, and Raiſing this Portion; by which Act all Conveyances made by old Sir Robert Carr, ſince the Year 1639. are made void, except ſuch as were made upon valuable Conſiderations; but all thoſe made by him before the ſaid Year, with Power of Revocation (if not actually revoked) are ſaved; and in the Year 1636. he had executed a Conveyance, by which he had made a Settlement of his Eſtate in Tail, with a Power of Revocation; but it did not appear that he did ever revoke the ſame.

The greateſt Part of the Lands appointed by this Act of Parliament, to be ſold by the Truſtees, are the Lands compriſed in that Settlement; and now, after the Death of Sir Robert Carr, the Plaintiff exhibits his Bill againſt the Son, (not knowing that ſuch a Settlement was made in the Year 1636. till the Defendant had ſet it forth in his Anſwer;) and by this Bill he deſired that the Truſtees may execute their Truſt, &c. and that he may have Relief.

On the Defendant's Side it was urged, That after the Marriage there was a Bond given for an Additional Jointure, and it was upon that Account that the Defendant was drawn in to execute theſe Articles: And if the very Reaſon and Foundation of his entring into them failed, then they ſhall not bind him in Equity; and in this Caſe it did fail, becauſe the Plaintiff had diſabled himſelf to make any other Jointure, by a Pre-conveyance made and executed by him, of his whole Eſtate; and if this Agreement will not bind him, then this Court cannot enlarge the Plaintiff's Remedy, or appoint more than what by the Articles is agreed to be done; neither can the Defendant's ſealing incumber the Eſtate-Tail in Equity, becauſe the Lands were not

Ex parte Def.

not then in him, his Father being Tenant in Tail, and then living; and the subsequent Descent by which the Lands are cast upon him, alters not the Case, for the very Right which descends is saved by the Act from being charged.

But on the other Side it was argued, That though the Marriage did proceed upon the Defendant's Sealing, yet the Assurance which was to be made, was a principal Motive thereunto; and it being agreed before Marriage, though not executed, it was very just that he should seal afterwards; and though the additional Jointure was not made, yet there was no Colour that the Defendant should break his Articles for that Reason; because if the Bond be not perform'd, 'tis forfeited, and may be sued; and nothing appeared in the Case of any Conveyance made by Sir Francis, whereby he had disabled himself to make an additional Jointure, and he hath expressly denied it upon his Oath. And though it was objected, That the Money was raised by the old Lady Carr, and by the Direction of the Trustees lodged in the Hands of one Cook, who is become Insolvent; it was answered, That there was no Proof of the Consent of the Trustees, and therefore this Payment cannot alter the Case.

After the Matter thus stated, the Lord Chancellor delivered his Opinion, That the 6000 l. is due to the Plaintiff, unpaid and unsatisfied; for though the Marriage had not taken Effect, yet the Covenant binds the Defendant, because a Deed is good for a Duty without any Consideration.

2. The Plaintiff has Remedy against the Person of the Defendant at Law for this 6000 l.

3. He has Remedy against such of the Defendant's Lands, which are not comprised in the Settlement made 1636. for as to them the Trustees may be enjoined to execute the Trust.

And he desired the Opinions of the Two Justices, if any Thing more could be done in this Case.

Justice Windham was of Opinion, That nothing more could be done, but to make a Decree to enforce the Execution of the Trust.

And Justice Wild said, That the Plaintiff has his Remedy at Law against the Defendant, and upon the Act of Parliament against the Trustees; but upon these Articles no Decree could be made to bind the Lands, for that would be to give a much better Security than the Parties had agreed on. But if there had been

been a Covenant in the Articles, that a Fine ſhould be levied, it might have been otherwiſe; 'tis only that a Fine is intended to be levied.

But as to that, the Lord Chancellor was of Opinion, That it was a good Covenant to levy a Fine, for the Words [Articles of Agreement, &c.] go quit through, and make that Clauſe a Covenant; but becauſe Juſtice Wild was of another Opinion, he deſired the Attorney General to argue theſe Three Points:

1. Whether this was a Covenant to levy a Fine or not?
2. If it was a Covenant, whether this Court can decree him to do it; for though the Party has a good Remedy at Law, yet whether this Court might not give Remedy upon the Land?
3. If it was a Covenant to levy a Fine, and the Court may decree the Defendant to do it; yet whether ſuch a Decree can be made upon the Prayer of this Bill, it not being particularly prayed; for the Plaintiff concluded his Bill, with praying Relief in the Execution of the Truſt, &c.

In Trinity-Term following theſe Points were argued by Serjeant Maynard, Sir John Churchil, and Sir John King for the Plaintiff; Mr. Attorney and Mr. Solicitor, and Mr. Keck for the Defendant, all in one Day, and in the ſame Order as named.

The Council for the Defendant urged, That this was no Covenant in Law to enforce the Defendant to levy a Fine: 'Tis agreed that there is no need of the Word [Covenant] to make a Covenant; but any Thing under the Hand and Seal of the Parties, which imports an Agreement, will amount to a Covenant; ſo in 1 Roll. Abr. 518. theſe Words in a Leaſe for Years, viz. That the Leſſee ſhall Repair, make a Covenant; ſo in the Caſe of Indentures of Apprentiſhip there are not the formal Words of a Covenant, but only an Agreement that the Maſter ſhall do this, and the Apprentice ſhall do that; and theſe are Covenants: But in all theſe Caſes there is ſomething of an Undertaking; as in 1 Roll. 519. Walker *verſus* Walker. If a Deed be made to another in theſe Words, viz. I have a Writing in my Cuſtody, in which W. ſtandeth bound to B. in 100 l. and I will be ready to produce it; This is a Covenant, for there is a preſent Engaging to do it, but there are no ſuch Words here, 'tis only a Recital, That whereas a Fine is intended to be levied to ſuch Uſes, &c. 'Tis only Introductive to another Clauſe, without poſitive or affirmative Words, and therefore can never be intended to make a Covenant, Ex parte Def.

but are recited to another Purpoſe, viz. To declare the Uſe of a Fine, in caſe ſuch ſhould be levied.

If Articles of Agreement are executed in Conſideration of an intended Marriage, and one Side covenants to do one Thing, and the other Side another Thing; was it ever imagined that upon theſe Words, [Whereas a Marriage is intended, &c.] that an Action of Covenant might be brought to enforce the Marriage: And yet there is as much Reaſon for the one as the other; therefore ſince the Parties have neither made nor intended it for a Covenant, 'tis not neceſſary that it ſhould be ſo conſtrued.

If this is a Covenant, the Parties at Common Law could only bring an Action of Covenant, and recover Damages for not levying of the Fine, and that the Plaintiff may do now upon the expreſs Covenant for Non-payment of the Money; but then the Breach muſt be aſſigned according to the Words, viz. That the Defendant did not levy a Fine as intended, who may plead that a Fine was never intended to be levied; and by what Jury ſhall this be tried?

It may be objected, That every Article ſtands upon its own Bottom, and the Title of them (being Articles of Agreement) extends to every Paragraph.

But as to that, each of theſe Articles is to be conſidered by it ſelf; and every Paragraph begins, viz. It is covenanted, &c. which ſhews it was never intended to make it a Covenant, by the Title of the Articles, and the rather, becauſe 'tis unreaſonable to make ſuch a Conſtruction; for it is not to be ſuppoſed that a Man will covenant that a Fine ſhall be levied, as in this Caſe, by A. and B. and himſelf, when 'tis not in his Power to compel another.

2. Admitting it to be a Covenant, yet it would be very hard to decree the Execution of a Fine in Specie; for the Father of the Defendant was alive when he executed the Deed, and the Father being Tenant in Tail, who never ſealed, the Son could have no preſent Right, who did ſeal; and if Matters had ſtood now as then, how could a Court of Equity decree a Fine, by which a Right might be extinguiſhed, but could never be tranſferred, and by which no Uſe could be declared? For though ſuch a Fine be good by Eſtoppel, before the Tail deſcends to the Iſſue; yet no Uſe can be declared thereupon, nor upon any Fine by Eſtoppel; and there is no Reaſon why Length of Time ſhould put the Plaintiff into a better Condition than he was when the Articles were executed.

3. And

3. And laſtly, ſince here is a particular Relief prayed, in no wiſe concerning the levying of this Fine, but only a Relief in the Execution of the Truſt, this Court cannot decree the Defendant to levy one, it being againſt the conſtant Courſe and Rules thereof.

But on the other Side it was ſaid by the Plaintiff's Council, that the Words do declare the Intent of the Parties, that a Fine ſhall be levied; and 'tis the Intent which makes the Agreement; and where there is an Agreement, an Action of Covenant will lie. Ex parte Quer.

If a Man covenant to do ſuch a Thing in Conſideration of a Marriage, and then there is this Clauſe, viz. Whereas it is intended that he ſhall marry before *Michaelmas*, that then, *&c.* certainly upon the whole Deed here is a good Covenant to marry before Michaelmas.

In this Caſe 'tis covenanted, that 6000 l. ſhall be paid, and that it ſhall be ſecured as herein is after mentioned; then 'tis declared, that a Fine is intended to be levied for that Purpoſe; this is a good Covenant to make a Security by a Fine.

But if the particular Manner how the Security was to be made, had been omitted, yet upon the Words [Covenant to ſecure it], the Court hath a good Ground to make a Decree to levy a Fine, that being the only Way to ſecure it.

2. As to the Objection, That the Defendant had but a poſſibility of having the Eſtate when he entred into this Covenant, (admitting it to be ſo) yet why ſhould that be a Reaſon to hinder him from making good the Security when he hath it; if Father and Son covenant to make an Aſſurance, the Father who hath the Eſtate in Poſſeſſion dies, the Decree muſt then operate upon that Eſtate in the Hands of the Son.

3. Here is a general Prayer for a proper Relief, in which the Plaintiff's Caſe is included, and therefore prayed Judgment for him.

The Lord Chancellor, preſently after the Arguments on each Side, delivered his Opinion, That upon the whole Frame of the Articles there was a Covenant to levy a Fine; for wherever there is an Agreement under Hand and Seal, Covenant lies; that in this Caſe there was a plain Covenant, if the firſt Article of giving farther Security be coupled to that Paragraph of intending to levy a Fine, for that is the farther Security intended, ſo that the Meaning of the Parties runs thus; I do intend to levy a Fine, which is for the ſecuring of 6000 l. and this appears to be their Agreement. Now there are many Caſes where Words Curia.

will make a Covenant, becauſe of the Agreement, when the general Words of Covenant, Grant, &c. are wanting; as * Yielding and Paying will make a Covenant, for the Reaſons aforeſaid.

*Hays *verſus* Bickerſtaff. Antea & Poſtea. Cook *verſus* Herl.

And therefore the Party having provided himſelf of real as well as perſonal Security by theſe Articles, he ſaid he would not deprive him of it; eſpecially when it might be more Trouble to bring an Action of Covenant for the not levying of the Fine, for upon that many Queſtions might ariſe, as who ſhould do the firſt act, &c. for which Reaſons he decreed the Execution of the Fine in Specie.

DE

DE
Term. Sanctæ Trin.
Anno 28 Caroli II. in Communi Banco.

Ingram *versus* Tothill.

REplevin: The Case was; A Man made a Lease for 99 Years, if A. B. and C. should so long live, rendring an Herriot after the Death of each of them successively, as they are all Three named in the Deed; the last named died first; and if an Herriot should be paid, was the Question.

Justification ill. 1 Vent. 314. Mod. Rep. 216. Postea.

Stroud, Serjeant, urged that it should not, because the Reservation is the Lessor's Creature, and therefore to be taken strongly against him: As if Rent be reserved to him and his *Assigns, or to him and his Executors, the Heir shall not have it: So is the Authority in 33 Eliz. Owen 9. Reddend' to the Lessor, his Executors and Administrators durante termino 21 Annorum, *&c.* the Heir shall not have the Rent, because 'tis not reserved to him.

*Per *North*, a Devisee is not Assignee to take. 5 Co. 35. Latch. 274.

In this Case the Herriot is reserved if the Three die successively, and the Lessor is contented to trust to that Contingency.

Reddend' annuatim durant' termino prædict' to the Lessor and his Assigns, the Heir shall have it, tho' not named, Latch. 99. 2 Sand. 367.

As to this Point, the Court gave no Opinion, but Judgment was given for the Plaintiff upon the Pleading, because the Defendant had justified the taking of a Distress, by vertue of a Lease for a Term of Years, if Three live so long, and did not aver that any of the Lives were in being.

2. He sets forth, That one of them was seised, and being so seised died, but doth not say obiit inde seisint, and these were held incurable Faults.

Anonymus.

Anonymus.

Exceptions to the Count in a *Formedon in Diſcender.*

IN a Formedon in Diſcender: The Tenants by Turner, Serjeant, of Council with them, took Three Exceptions to the Count.

Mod. Rep. 219. 8 Co. 88.

1. The Demandant (being Brother to the Tenant in Tail who died without Iſſue) ſets forth, that the Land belonged to him poſt Mortem of the Tenant in Tail, without ſaying, that he died without Iſſue: In the ancient Regiſter in a Formedon, 'tis pleaded, that the Tenant in Tail died without Iſſue, and ſo it is in Co. Entr. 254. b. Raſt. Entr. 341. b. quæ poſt Mortem of the Donee reverti debeant, eo quod the Donée obiit ſine Hærede; all the Precedents are ſo, 9 E. 4. 36.

2. The Demandant makes as if there were Two Heirs of one Man, which cannot be pleaded, for he counts that his eldeſt Brother was Heir to his Father, and that after his Death he is now Heir, which cannot be, for none is Heir to the Father but the eldeſt Son, and therefore when they are both dead without Iſſue, the next Brother is Heir to him who was laſt ſeiſed, and not to the Father, and then he ought to be named, which is not done in this Caſe, Hern's Pleader, fol.

'Tis true, in a Formedon in Reverter (the Tail being ſpent) the Donor ought not to name in his Count every Iſſue inheritable to the Tail, becauſe he may not know the Pedigree; and therefore 'tis well enough for him to ſay, quæ poſt Mortem of the Donee ad ipſum reverti debeant, eo quod he died without Iſſue; but in a Formedon in Diſcender, 'tis preſumed that the Demandant knows the Deſcent, and therefore he ought to name every one to whom any Right did diſcend, Jenkins and Dawſon's Caſe. Hetley 78.

Dyer 216.

1 Inſt. 326.

3. The Demandant hath not ſet forth, That he is Heir of J. begotten on the Body of his Wife, which he ſhould have done, becauſe this being in the Diſcender he muſt make himſelf Iſſue to the Tail.

Ex parte Def.

Theſe Exceptions were anſwered by Serjeant Seys; and as to the firſt, he ſaid, That in a Formedon in Diſcender, he need not to ſet forth that the Tenant in Tail died without Iſſue, which he agreed muſt be done in a Formedon in Remainder or Reverter, 39 E. 3. 27. Old Entr. tit. Formedon pl. 3. 7 H. 7. 7. b. a Caſe expreſs in the Point.

To

To the Second Exception he said, That it was no Repugnancy in Pleading to say, that Two were Heirs to One Man, for they may be so at several Times, and so it appears to be in this Case, since 'tis said Post Mortem of his Brother who was Heir.

To the Third Exception, 'Tis well set forth that the Demandant was the Issue of Ingram, begotten of the Body of Jane; for he saith his Brother was so, and after his Death he was Brother and Heir of him, which is impossible to be, unless he was begotten as aforesaid; and of this Opinion were all the Court, viz. That 'tis well enough set forth, that the Tenant in Tail died without Issue; for if he had any Children alive it could not descend to the Demandant as Brother and Heir, which he hath alledged; and they all agreed the Difference between a Formedon in the Discender, Remainder and Reverter. And as to the Second Exception, there is no Contradiction to say Two are Heirs to One tempore diviso. And the last Exception had no force in it. But then it was observed, That the Demandant in his Writ had set out his Title after the Death of the Tenant in Tail, and in the Count 'tis only Quæ post Mortem, &c. But to that it was answered, it relates to the Writ, and what is therein shall supply the Et cætera in the Count. Judgment.

Woodward *versus* Aston *in Banco Regis.*

INdebitatus Assumpsit for 10 l. in Money received to the Plaintiff's Use, and upon a Trial at Bar this Term, the Case upon Evidence was, viz.

Sir Robert Henly, Prothonotary of the Court of King's Bench, makes a Grant of the Office of Clerk of the Papers (which of Right did belong to him) unto Mr. Vidian and Mr. Woodward, for their Lives, and the Life of the longest Liver of them.

Afterwards Mr. Vidian makes a Patol Surrender of this Grant, and then Sir Robert Henley makes a new Grant to Mr. Woodward and Mr. Aston the Defendant, for their Lives, and for the Life of the Survivor: Mr. Vidian dies, and whether the Plaintiff Woodward should have all the Profits of the Office by Survivorship, was the Question.

It was agreed, That this was one entire Office; and as one of them cannot make a Deputy, so he cannot appoint a Successor.

But the Doubt was whether, the Plaintiff had not consented that the Defendant should be taken into the Office, and had agreed to the new Grant which was made afterwards; for it was admitted

Joint Office for Life and to the Survivor, one consents that another shall be admitted, 'tis a Surrender. 1 Ventris 296.

admitted that if he consented before Mr. Aston came in, it must then be found for the Defendant; for by his Consent he had barred himself of his Right and Benefit of Survivorship, and that by his consenting to the new Grant, that in Law was a Surrender of the first Grant, and then the Defendant is Jointenant with the Plaintiff, and if so, his Action is not maintainable.

And upon these two Points only it was left to the Jury, who found for the Defendant.

The Evidence to the first Point was, That when Mr. Vidian proposed to the Court that the Defendant might succeed him, after some Opposition and Unwillingness in the Plaintiff to agree to it; yet at length he declared that he did submit to it, and accordingly the Defendant was admitted; but there was no formal Entry of his Admittance as an Officer, but only the Court's declaring their Consent that he should take his Place.

Ex parte Quer. On the other Side it was insisted on for the Plaintiff, and proved, That his Submission to the Court was with a salvo Jure, and what he did was reluctante Animo, thinking it was a Hardship upon him, as he often since declared; so that it was quasi a compulsory Consent made in Obedience to the Court, with whom it was not good Manners in him to contend.

Several Points were stirred at the Tryal; as,

1. Whether a Surrender of the Grant of an Office by Parol was good.

2. Whether if a Grant be made of an Office, or of any other Thing which lies in Grant, and the Deed is lost or cancelled, the Office or the Thing granted falls to the Ground, for the Deed is the Foundation; and a Case was cited in the Lord Dyer; If there be Two Jointenants, and one cancels the Deed, it hath destroyed the Right of the other; Quære of these Things: But it was agreed, That if Two Men who have one Office for their Lives, and the Survivor of them, if one surrenders to the other, and then a new Grant is made to this other and a Stranger, he hath debarred himself of the Survivorship, and he and the Stranger are jointly seised.

Crossman

Croſſman *verſus Sir* John Churchil.

IN a Quare Impedit the Plaintiff's Title was ſet forth in his Declaration, which was alſo found in a Special Verdict, That Sir George Rodney was ſeiſed of the Advowſon in Fee, and died ſeiſed, leaving Two Siſters who were his Coheirs: That Sir John Rodney being alſo one of the ſame Family, and pretending a Right to the Eſtate; for preventing Suits that might happen, they all enter into an Agreement by Indentures mutually executed, by which it was agreed, That Sir John Rodney ſhall hold ſome Lands in Severalty, and the Coheirs ſhall hold other Lands in the like Manner; and as for this Advowſon, a temporary Proviſion was made thereof, That each of them ſhould preſent by Turns, and this was to continue till Partition could be made; Then comes an Act of Parliament and confirms the Indenture, and enacts, That every Agreement therein contained ſhall ſtand, and that all the reſt of the Lands not particularly named, and otherwiſe diſpoſed by the ſaid Indenture, ſhould be held by theſe Three in Common; One of the Three, who by Agreement was next to Preſent, grants the next Avoidance (the Church being then full) to the Plaintiff, and the Queſtion was, Whether theſe Three Perſons were not Tenants in Common of the Advowſon? And if ſo, then the Grant of the next Avoidance cannot be good by One alone, becauſe he hath not the whole Advowſon, but only a Right to the Third Part.

Where an Agreement for a Preſentation by Turns is good.

It was ſaid, That if Tenants in Common had made ſuch an Agreement, it would not have been any Diviſion of their Intereſt, for there muſt be a Partition to ſever the Inheritance.

The Court were all of Opinion, That Judgment ſhould be given for the Plaintiff; for there was an Agreement that there ſhall be a Preſentation by Turns, and therefore for One Turn each hath a Right to the whole Advowſon, by Reaſon of the Act of Parliament by which that Agreement is confirmed, and thereby an Intereſt is ſettled in each of them till Partition made: But this Agreement would have veſted no Intereſt in either of them without an Act of Parliament to corroborate it; therefore there had been no Remedy upon it but by an Action of Covenant. This Caſe was argued Four Times, and not One Authority cited.

Curia.

6 Co. 12.
2 Rolls. 255.
2 Inſt. 365.
N. B. 62.

The Earl of Shaftsbury *verſus Lord* Digby. *In Banco Regis.*

For Words upon the Statute of 2 *R.* 2. *c.* 5. Jones 49.

SCandalum Magnatum. The Plaintiff declares upon the Statute of 2 R. 2. cap. 5. for theſe Words, viz. You are not for the King, but for Sedition and for a Commonwealth, and by God we will have your Head the next Seſſions of Parliament.

After Verdict for the Plaintiff, and 1000 l. Damages given, it was moved in Arreſt of Judgment, and ſeveral Exceptions taken.

1. As to the Recital of the Statute, the Words of which are, That no Man ſhall deviſe any Lies, *&c.* and the Plaintiff for the Word deviſe had uſed the Latin Words contrafactio in his Declaration, which was very improper, that being to counterfeit and not to deviſe; for it ſhould have been machino or fingo, thoſe are more expreſſive Words of Deviſe.

2. 'Tis alledged, that the Defendant dixit mendacia of the Plaintiff, viz. hæc Anglicana verba ſequen', and doth not alledge that he ſpoke the Words.

3. The moſt material Objection was a Miſtake in the Recital of the Statute, the Words of which are, That none ſhall ſpeak any ſcandalous Words of any Dukes, Earls, *&c.* the Juſtices of either Bench, nor of any other great Officer of the Kingdom; but the Plaintiff in his Declaration recites it thus, viz. None ſhall ſpeak any ſcandalous Words of any Dukes, Earls, *&c.* Juſtices of either Bench, great Officers of the Kingdom, and leaves out the Words, neque al; ſo that it muſt be conſtrued thus, None to ſpeak of any Dukes, Earls, *&c.* being great Officers of the Kingdom; and then 'tis not enough that the Plaintiff is Comes, but he alſo ought to be a great Officer of the Kingdom, which is not ſet out in this Caſe.

But upon great Debate and Deliberation, theſe Exceptions were over-ruled; and the whole Court gave Judgment for the Plaintiff.

As to the Firſt Exception, they ſaid, Contrafactio is a legal Word, and apt enough in this Senſe, and ſo are all the Precedents; and thus it was pleaded in the Lord Cromwel's Caſe.

As to the Second Exception, it was ſaid, the Mendacia which were told were the Engliſh Words which were ſpoken; and the [viz. hæc Anglicana verba ſequen' being in the Accuſative Caſe.] are governed by the ſame Verb which governs the Words precedent

cedent (viz. horribilia Mendacia) Besides for the supporting of an Action the [viz.] may be transposed, and then it will be well enough, viz. the Defendant spoke hæc Anglicana verba, viz. Lies of the Plaintiff.

As to the Third Exception it was answered, That the Plaintiff need not recite the Statute, it being a * general Law; and admitting there was no Necessity, yet if he will undertake to recite it, and mistake in a material Point, 'tis incurable; but if he recites so much as will serve to maintain his own Action truly, and mistakes the rest, this will not vitiate his Declaration; and so he hath done here by reciting so much of the Statute, which enacts, That no Man shall speak any scandalous Words of an Earl, which is enough (he being an Earl) to entitle him to an Action, and he concludes prout per eundem Actum plenius liquet; and the Court grounded themselves principally upon a Judgment given in this Court, which was thus, viz. There was a Robbery committed, and the Party brought an Action upon the Statute of Huy and Cry, in which he recited incendia Domorum, the said Statute beginning, Forasmuch as from Day to Day Robberies, Murders, burning of Houses, *&c.* and the Precedents are all so: But the Parliament Roll is Incendia generally, without Domorum; and it was strongly urged, that it was a Misrecital, which was fatal: But the Court were all of Opinion, That the Plaintiff's Case being only concerning a Robbery, for which the Statute was well recited, and not about Burning which was mistaken, it was for that Reason good enough; and Judgment was given accordingly.

* Sid. 348.

13 E. 1. c. 1.

When this Cause was tried at the Bar, which was in Easter-Term last, the Lord Mohun offered to give his Testimony for the Plaintiff, but refused to be sworn, offering to speak upon his Honour; but Justice Wyld told him, in Causes between Party and Party he must be upon his Oath.

The Lord Mohun asked him, whether he would answer it? The Judge replied, That he delivered it as his Opinion; and because he knew not whether it might cause him to be questioned in another Place, he desired the rest of the Judges to deliver their Opinions, which they all did, and said he ought to be sworn; and so he was, but with a salvo jure; for he said there was an Order in the House of Peers, That 'tis against the Priviledge of the House for any Lord to be sworn.

Anonymus.

DEBT upon the Statute for not coming to Church, and concludes Per quod Actio accrevit eidem Domino Regi & quer' ad exigend' & habend'. The Exception after Judgment was taken, that it ought to have been only Actio accrevit eidem the Plaintiff, qui tam, &c. and not exigend' & habend' for the King and himself; Sed non allocatur: For upon Search of Precedents, the Court were all of Opinion that it was good either way.

Anonymus.

Factor, where he cannot sell but for ready Money.

IN Accompt: Judgment was given quod computet; and the Defendant pleads before the Auditors, That the Goods whereof he was to give a reasonable Accompt were bona peritura; and though he was careful in the keeping of them, yet they were much the worse; That they remained in his Hands for want of Buyers, and were in Danger of being worse, and therefore he sold them upon Credit to a Man beyond Sea.

Curia.

The Plaintiff demurred; and after Argument by Barrel Serjeant for the Plaintiff, and Baldwin Serjeant for the Defendant, the whole Court were of Opinion that the Plea was not good. For if a Merchant deliver Goods to his Factor ad merchandizand', he cannot sell them upon Credit, but for ready Money, unless he hath a particular Commission from his Master so to do; for if he can find no Buyers, he is not answerable; and if they are bona peritura, and cannot be sold for Mony upon the Delivery, the Merchant must give him Authority to sell upon Trust. If they are burned, or he is robbed without his own Default, he is not liable; and in this Case it was not pleaded that he could not sell the Goods for ready Money; and the Sale it self was made beyond Sea, where the Buyer is not to be found; like the Case of * Saddock *and* Burton, where in Accompt against a Factor, he pleads that he sold the Jewel to the King of Barbary for the Plaintiff's Use, and upon a Demurrer the Plea was held naught; for when a Factor hath a bare Authority to sell, in such Case he hath no Power to give a Day of Payment, but must receive the Money immediately upon the Sale.

* Bulst. 103. Yelv. 202.

There-

Therefore in the Case at Bar, if the Master is not bound by the Contract of the Servant without his Consent, or at least the Goods coming to his Use; neither shall the Servant have Authority to sell without ready Money, unless he hath a particular Order for that Purpose.

There was another Thing moved in this Case for the Plaintiff, that the Plea ought to be put in upon Oath; for having pleaded that he could not sell without Loss, he ought to swear it, Fitzh. Accompt 47. But no Opinion was delivered herein, only the Chief Justice said, That the Plaintiff ought to have required the Plea upon Oath, for otherwise it was not necessary: But for the Substance of the Plea it was held ill, and Judgment was given for the Plaintiff.

Harris's Case.

Husband dies, his Wife Executrix, she dies before Probate, Administration must be to the next of Kin of the Husband.

22 & 23 Car. 2. cap. 10.

Serjeant Hopkins moved for a Prohibition. The Case was: A Man makes a Will, and appoints his Wife to be Executrix, and devises a Shilling to his Daughter for a Legacy, and dies; the Executrix, before Probate of the Will, dies also Intestate; and whether the Goods shall be distributed by the Act for settling Intestates Estates amongst the next of Kin to the Executrix, or to the next of Kin to the Testator her Husband, was the Question: Since she dying before Probate, her Husband in Judgment of Law died also Intestate.

This Case seems to be out of the Statute, the Husband having made a Will, and the Act intermeddles only where no Will is made.

The Court delivered no Judgment in it, but seemed to incline that the Statute did extend to this very Case, and that Administration must be committed to the next of Kin of the Husband; but if there should be no Distribution, it must then be according to the Will of the Testator.

Reder *versus* Bradley.

Judgment reversed in an inferior Court where the Damage was laid to 30 *l.*

IT was moved to reverse a Judgment given in an Honour Court upon a Writ of false Judgment brought here: The Plaintiff declared in the Action below, that there was a Communication between him and the Defendant concerning the Service of his Son; and it was agreed between them, That in Consideration the

the Plaintiff would permit his Son to serve him, the Defendant promised to pay the Plaintiff 30 s. The Plaintiff avers that he did permit his Son to serve him; and that the Defendant hath not paid him the 30 s. There was a Verdict for the Plaintiff, and the Exceptions now taken were:

1. 'Tis not said that the Jurors were electi ad triand', &c.

Infra. 206. 2. He lays his Damage to 30 l. of which a Court Baron cannot hold Plea; for the Difference taken by my Lord Coke is where Damages are laid under 40 s. Costs may make it amount to more; but where 'tis laid above, in such Case all is coram non Judice; for which Reason Judgment was reversed; but in this Court, the Judge doth not pronounce the Reversal as 'tis done in the King's Bench.

Lane *versus* Robinson.

Inferior Court. TRespass for taking of his Cattle; the Defendant justifies by Vertue of an Execution in an Action of Trespass brought in a Hundred Court; and the Plaintiff demurred.

Serjeant Pemberton took Two Exceptions to the Plea:

2 Cro. 443, 526, Hob. 180. Sid. 348. 1. Because the inferior Court not being of Record, cannot hold Plea of a Trespass quare vi & armis & contra pacem, but it was not allowed; for Trespasses are frequently brought there, and the Plaintiff may declare either vi & armis or contra pacem.

Postea. 2. The Defendant reciting the Proceedings below saith, taliter processum fuit; Whereas he ought particularly to set forth all that was done, because not being in a Court of Record, the Proceedings may be denied and tried by Jury.

But the Court incline that it was pleaded well enough, and that it was the safest Way to prevent Mistakes; but if the Plaintiff had replied de injuria sua propria absque tali causa, that had traversed all the Proceedings. Quære whether such a Replication had been good, because the Plaintiff must answer particularly that Authority which the Defendant pretended to have from the Court; but no Judgment was given.

Sherrard

Sherrard *versus* Smith.

TRespals Quare clausum fregit, and for taking away his Goods; the Defendant justifies the Taking by the Command of the Lord of the Mannor, of which the Plaintiff held by Fealty and Rent, and for Non-payment thereof, the Goods were taken nomine Districtionis.

The Plaintiff replies, That the Locus in quo est extra, absq; hoc quod est infra feodum: The Defendant demurs specially, because the Plaintiff pleading hors de son fee, should have taken the Tenancy upon him, 9 Co. Bucknal's Case, 22 H. 6. 2, 3. Keilway 73. 14 Ass. pl. 13. 1 Inst. 1. b. where this is given as a Rule by my Lord Coke.

Hors de son Fee, when to be pleaded.

Serjeant Pemberton on the other Side agreed, That in all Cases of Assize, hors de son fee is no Plea, without taking the Tenancy upon him, 2 Ass. placito 1. And in 5 E. 4. 2. 'tis said, That in Replevin the Party cannot plead this Plea, because he may disclaim; but Brook placito 15. tit. Hors de son fee, saith this is not Law, and so is 2 H. 6. 1. and many Cases afterwards were against that Book of Ed. 4. and that a Man might plead hors de son fee, as if there be a Lord and Tenant holding by Fealty and Rent; and he makes a Lease for Years, and the Lord distrains the Cattle of the Lessee, though the Tenant hath paid the Rent and done Fealty, there if the Lessee alledge that his Lessor was seised of the Tenancy in his Demesn, as of Fee, and held it of the Lord by Services, &c. of which Services the Lord was seised by the Hands of his Lessor, as by his true Tenant, who hath leased the Lands to the Plaintiff; and the Lord to charge him hath unjustly avowed upon him who hath nothing in the Tenancy, 'tis well enough, 9 Co. Case of Avowries; and the Reason given in 5 Edw. 4. about Disclaimer, will not hold now, for that Course is quite altered, and is taken away by the Statute of the 21 H. 8. cap. 19. which enacts, That Avowries shall be made by the Lord upon the Land, without naming his Tenant.

Ex parte Quer.

13 Assize 28.
28 Assise 41.

But in case of Trespals, there was never any such Thing objected as here; for what Tenancy can the Plaintiff take upon him in this Case? He cannot say tenen' liberi tenementi, for this is a bare Action of Trespals, in which, though the Pleading is not so formal, yet it will do no Hurt; for if it had been only extra

tra feodum, without the Traverſe, it had been good enough, and of that Opinion was the Court in Hillary-Term following, when Judgment was given for the Plaintiff (abſente Scroggs): And the Chief Juſtice ſaid, That the Rule laid down by my Lord Coke in 1 Inſt. 1. b. That there is no pleading hors de ſon fee without taking the Tenancy upon him, is to be intend in Caſes of Aſſize; and ſo are all the Caſes he there cites for Proof of that Opinion, and therefore ſo he is to be underſtood: But this is an Act of Treſpaſs brought upon the Poſſeſſion, and not upon the Title. In the Caſe of Avowry, a Stranger may plead generally hors de ſon fee, and ſo may Tenant for Years; and this being in the Caſe of a Treſpaſs, is much ſtronger, and if the Plaintiff deſtroys the Defendant's Juſtification, 'tis well enough.

Sir William Hickman *verſus* Thorne *& alios.*

Preſcription againſt another Preſcription, not good without a Traverſe.

Yelv. 217. 218.

IN a Replevin: The Defendant juſtifies the Taking, for that the Locus in quo was his Freehold, and that he took the Cattle there Damage feaſant.

The Plaintiff in Bar to the Avowry replies, That the Locus in quo, &c. is Parcel of ſuch a Common Field, and preſcribes to have Right of Common there, as appendant to Two Acres which he hath in another Place.

The Defendant rejoins, That there is a Cuſtom, that every Freeholder who hath Lands lying together in the ſaid Common Field, may encloſe againſt him who hath Right of Common there, and that he had Lands there, and did encloſe: The Plaintiff demurs, and Serjeant Newdigate took Exceptions to the Rejoinder.

Ex parte Quer.

1. For that he did not aver, that the Lands which he encloſed did lie together, and therefore had not brought his Caſe within the Cuſtom alledged: Sed non allocatur, becauſe he could not encloſe if the Lands had not laid together.

2. He gives no Anſwer to the Plaintiff's Right of Common but by Argument, which he ſhould have confeſſed with a bene & verum eſt, and then ſhould have avoided it, by alledging the Cuſtom of Encloſure; like the Caſe of *Ruſſel and Broker, where in Treſpaſs for cutting Oaks, the Defendant pleads, That he was ſeiſed of Meſſuage in Fee, and preſcribes to have rationabile eſtoverium ad libitum capiend' in boſcis; the Plaintiff replies, That the Locus in quo was within the Foreſt, and that the

*2 Leon. 209.

the Defendant and all those, &c. habere consueverunt rationabile estoverium, &c. per liberationem Forestarii; and upon a Demurrer the Replication was held naught, because the Plaintiff ought to have pleaded the Law of the Forest, viz. Lex Forestæ talis est; or to have traversed the Defendant's Prescription, and not to have set forth another Prescription in his Replication without a Traverse.

3. The Defendant should have pleaded the Custom, and then have traversed the Prescription of the Right of Common; for he cannot plead a Custom against a Custom, 9 Co. 58. Aldred's Case, where one prescribes to have a Light, the other cannot prescribe to stop it up.

Serjeant Pemberton contra. He said, That which he took to be the only Question in the Case was admitted, viz. That such a Custom as this to enclose was good; and so it has been adjudged in Sir Miles Corbet's Case, 7 Co. But as to the Objections which have been made, the Defendant admits the Prescription for Right of Common, but saith, He may enclose against the Commoners, by reason of a Custom, which is a Bar to his very Right of Common, and therefore need not confess it with a bene & verum est; neither could he traverse the Prescription, because he hath admitted it. 'Tis true, where one prescribes to have Lights in his House, and another prescribes to stop them up; this is not good, because one Prescription is directly contrary to the other, and for that Reason one must be traversed; but here the Defendant hath confessed, that the Plaintiff hath a Right of Common, but 'tis not an absolute but a qualified Right, against which the Defendant may enclose; and here being Two Prescriptions pleaded, and one of them not being confessed, it must from thence necessarily follow, that the other is the Issue to be tried, which in this Case is, Whether the Defendant can enclose or not. Ex parte Def.

The Chief Justice, and the whole Court were of Opinion, That where there are several Freeholders who have Right of Common in a Common Field, that such a Custom as this of Enclosing is good, because the Remedy is Reciprocal; for as one may enclose, so may another. But Justice Atkyns doubted much of the Case at Bar, because the Defendant had pleaded this Custom to Enclose in Bar to a Freeholder, who had no Land in the Common Field where he claimed Right of Common, but prescribed to have such Right there, as appendant to Two Acres of Land he had alibi, for which Reason he prayed to amend upon Payment of Costs. Curia.

Attorney General *versus Sir* Edward Turner, *in Scaccario.*

Expoſition of the King's Grant.

INformation. The Caſe was, viz. The King by Letters Patents granted ſeveral Lands in Lincolnſhire, by expreſs Words; and then this Clauſe is added, upon which the Queſtion did ariſe, Nec non totum illud fundum & ſolum & terras ſuas contigue adjacen' to the Premiſes, quæ ſunt aqua cooperta vel quæ in poſterum de aqua poſſunt recuperari; and afterwards a great Quantity of Land was gained from the Sea; and whether the King or the Patentee was intituled to thoſe Lands, was the Queſtion.

Deviſe of a Poſſibility good by a common Perſon.
2 Cro. 509. pl. 21.
1 Bulſt. 194.

Sawyer for the King argued, That he had a good Title, becauſe the Grant was void, he having only a bare Poſſibility in the Thing granted at that Time.

But Levins on the other Side inſiſted, That the Grant of thoſe Lands was good, becauſe the King may grant what he hath not in Poſſeſſion, but only a Poſſibility to have it. But admitting that he could not make ſuch a Grant; yet in this Caſe there is ſuch a Certainty as the Thing it ſelf is capable to have, and in which the King hath an Intereſt; and it is hard to ſay that he hath an Intereſt in a Thing, and yet cannot by any Means diſpoſe of it.

If it ſhould be objected, That nothing is to paſs but what is contigue adjacen' to the Premiſſes granted, and therefore an Inch or ſome ſuch ſmall Matter muſt paſs and no more; certainly that was not the Intention of the King, whoſe Grants are to be conſtrued favourably, and very bountifully for his Honour, and not to be taken by Inches.

Poſtea, Company of *Ironmongers* and *Naylor.*

If there are Two Marſhes adjoining, which are the King's, and he grants one of them by a particular Name and Deſcription, and then he grants the other contigue adjacen' ex parte auſtrali, certainly the whole Marſh will paſs; and 'tis very uſual in Pleading to ſay, a Man is ſeiſed of a Houſe or Cloſe, and of another Houſe, &c. contigue adjacen', that is to be intended of the whole Houſe.

In this Caſe the King intended to paſs ſomething when he granted totum fundum, &c. but if ſuch Conſtruction ſhould be made as inſiſted on, then thoſe Words would be of no Signification. 'Tis true, the Word illud is a Relative, and reſtrains the general Words, and implies that which may be ſhewn, as it were

with

with a Finger; and therefore in Doddington's Caſe, a Grant of omnia illa Meſſuagia ſituate in Wells, and the Houſes were not in Wells, but elſewhere; the Grant in that Caſe was held void, becauſe it was reſtrained to a certain Village, and the Pronoun illa hath Reference to the Town; but in this Caſe there could be no ſuch Certainty, becauſe the Land at the Time of the Grant made was under Water. 2 Co. 32.

But if the Patent is not good by the very Words of the Grant, the non obſtante makes it good, which in this Caſe is ſo particular, that it ſeems to be deſigned on purpoſe to anſwer thoſe Objections of any Miſtake or Incertainty, in the Value, Quantity, or Quality of the Thing granted, which alſo ſupplies the Defects for want of right Inſtruction given the King, in all Caſes where he may lawfully make a Grant at the Common Law, 4 Co. 34. Bozun's Caſe. Moor pl. 571.

And there is another very general Clauſe in the Patent, viz. Damus præmiſſa adeo plene, as they are or could be in the King's Hands, by his Prerogative or otherwiſe. * Adeo plene are operative Words, Whiſtler's Caſe, 10 Co. And there is alſo this Clauſe, Omnes terras noſtras infra fluxum & refluxum Maris. 'Tis true, theſe Words Præmiſſis præd' ſpectan' do follow; from whence it may be objected, That they neither did or could belong to the Premiſſes; and admitting it to be ſo, yet the Law will reject thoſe Words, rather than avoid the Grant in that Part. * Ante. Sid. 149.

In the Caſe of the Abbot of * Strata Marcella, the King granted a Manor, Et bona & catalla felonum dicto Manerio ſpectan'; now though ſuch Things could not be appendant to a Manor, yet it was there adjudged that they did paſs. * 9 Co. 27. b.

Such Things as theſe the King hath by his Prerogative, and ſome Things the Subject may have by Cuſtom or Preſcription; as Wrecks, &c. and in this very Caſe 'tis ſaid, That there is a Cuſtom in Lincolnſhire, that the Lords of the Manors ſhall have Derelict Lands, and 'tis a reaſonable Cuſtom; for if the Sea waſh away the Lands of the Subject, he can have no Recompence, unleſs he ſhould be entituled to what he gains from the Sea; and for this there are ſome Authorities, as Sir Henry Conſtable's Caſe, 5 Co. Land between High-Water and Low-Water Mark may belong to a Manor: 2 Roll. 168.

But no Judgment was given.

Moris *verſus* Philpot *in B. R.*

Releaſe by an Executor before Probate. 2 Levin. 214. T. Jones 104.

THE Plaintiff as Executor to T. brings an Action of Debt againſt the Defendant, as Adminiſtrator to S. for a Debt due from the ſaid Inteſtate to the Plaintiff's Teſtator. The Defendant pleads, that the Plaintiff releaſed to him all Brewing Veſſels, &c. and all other the Eſtate of S. lately deceaſed, (this Releaſe was before Probate of the Will,) to which Plea the Plaintiff demurred; and whether this Releaſe was a good Bar to the Plaintiff's Action, was the Queſtion.

Ex parte Quer.

It was ſaid for the Plaintiff, that it was not; for if a Conuſee releaſe to the Cogniſor all his Right and Title to the Lands of the Cogniſor, and afterwards ſues out Execution, yet he may extend the very Lands ſo releaſed; ſo if the Debtee releaſe to the Debtor all his Right and Title which he hath to his Lands, and afterwards gets a Judgment againſt him, he may extend a Moiety of the ſame Lands by Elegit; the Reaſon is, becauſe at the Time of theſe Releaſes given, they had no Title to the Land, but only an Inception of a Right, which might happen to take Place in futuro; ſo here a Releaſe by the Executor of the Debtee to the Adminiſtrator of the Debtor, before Probate of the Will, is not good; becauſe by being made Executor, he had only a Poſſibility to be entituled to the Teſtator's Eſtate, and no Intereſt 'till Probate, for he might refuſe to prove the Will, or renounce the Executorſhip. It is true, a Releaſe of all * Actions had been good by the Executor before Probate, becauſe a Right of Action is in him, and a Debt which conſiſts meerly in Action is thereby diſcharged, but in ſuch Caſe a Releaſe of all Right and Title would not be good, for the Reaſons aforeſaid.

* Godol. 145. pl. 4.

Ex parte Def.

But for the Defendant it was inſiſted, That this Releaſe was a good Plea in Bar, for if a Releaſe be made by an Executor of all his Right and Title to the Teſtator's Eſtate, and then the Executor ſues the Party releaſed (as the Adminiſtrator is ſued in this Caſe) for a Debt due to the Teſtator, the Releaſe is good; becauſe if he had recovered, in this Caſe the Judgment muſt be de Bonis Teſtatoris, which is the ſubject Matter, and that being releaſed, no Action can lie againſt the Adminiſtrator. Adjornatur.

DE

DE
Term. Sancti Mich.
Anno 28 Caroli II. in Banco Regis.

Piggot *Leſſee of Sir* Thomas Lee *verſus the Earl of* Salisbury.

Intrat' Paſch. 26 Car. 2. Rot. 609.

IN Ejectment for Fourteen Houſes and ſome Gardens in the Pariſh of St. Martin in the Fields, the Jury find as to all but one Moiety for the Defendant; as for the other Moiety, they find that theſe were formerly the Houſes of one Nightingale, who was ſeiſed thereof in Fee, and made a Leaſe of them, which commenced 1 Apr. 7 Jac. yet in being.

That the Reverſion deſcended to Bridget his Daughter and Heir, who married William Mitton, by whom ſhe had a Daughter named Elizabeth.

That upon the Marriage of the ſaid Elizabeth with Francis the Son of Sir Oliver Lee, by Fine and other Settlements theſe Houſes were ſettled to the Uſe of the ſaid Bridget for Life, then to the Uſe of Francis Lee and the ſaid Elizabeth, and the Heirs on the Body of the ſaid Elizabeth to be begotten by Francis.

And for want of ſuch Iſſue, to William Morton for Life, and afterwards to the right Heirs of Bridget Mitton for ever.

William Mitton and Bridget his Wife, before the Expiration of the Term, levy a Fine ſur conceſſerunt to two Cognizers, wherein the ſaid Husband and Wife conced' tenementa præd' & totum & quicquid habent in tenementis præd' cum pertin' for the Life of the ſaid Husband and Wife, and the Survivor of them, with Proclamations.

They find that the Leſſee for years attorned, and that the Fine thus levied was in Truſt for the Earl of Salisbury, and that before

Warranty where by diſplacing of a Right by a Fine *ſur conceſſit*, it ſhall bar the Heir. Jones 68. 2 Lev. 154.

fore the First Day of February before the Action brought he entred by the Direction of the Two Cognizees, and that he was seised prout Lex postulat.

That 1 Febr. 7. Jac. Sir Oliver Lee, Francis Lee his Son and Heir, and Elizabeth his Wife, William Mitton and Bridget his Wife, by Bargain and Sale convey the Premises to the Earl and his Heirs, which was enrolled in Chancery, in which Deed there was a Warranty against Sir Oliver and his Heirs.

That in the same Term, viz. Octab. Purificationis, William Mitton and Bridget his Wife, levied a Fine Sur Conusance de droit come ceo, &c. to the Earl.

That Francis Lee was Son and Heir of Sir Oliver Lee.

That Sir Oliver and Elizabeth died in the Life-time of Francis, and that Francis died leaving Issue Sir Thomas Lee, the now Lessor of the Plaintiff.

That the Warranty descended upon him being inheritable to the Estate Tail.

That the Estate of the Earl of Salisbury descended to the present Earl, who was the Defendant.

That Sir Thomas Lee entred and made a Lease to the Lessor of the Plaintiff.

Question. The Question upon this Special Verdict was, If by the Fine Sur concesserunt levied, 7 Jac. the Estate which the Husband and Wife had in Possession only passed? Or whether that and the Estate for Life, which the Husband had after the Tail spent, passed likewise?

If the latter, then they passed more than they could lawfully grant, because of the Intervention of the Estate Tail; and then this Fine wrought a *displacing or divesting the Estate of William Mitton for Life in Reversion, and turned it into a Right; and if so, then this collateral Warranty of Sir Oliver Lee will discend on Sir Francis, and from him to the Plaintiff, and will bar his Entry; but if the Estate was not displaced and turned into a Right at the time of the Warranty, then the Heir is not barred by this collateral Warranty of his Ancestor.

* Co. Lit. 338. b.

This Case was argued by Serjeant Pemberton for the Plaintiff, and by Sir William Jones the Attorney General for the Defendant.

Ex parte Quer. And for the Plaintiff it was said, That this Fine passed only the Estate which William Mitton and his Wife had in Possession, and no other, and therefore worked no divesting; and his Reasons were:

1. Such

1. Such a Construction seems most agreeable to the Intention of all the Parties to the Fine.

2. It may well stand with the Nature and the Words of the Fine.

3. It will be most agreeable both to the Judgments and Opinions which have formerly been given in the like Cases.

And as to the First of these, it will be necessary to consider what will be the Effect and Consequence of Levying this Fine, both on the one Side and the other. It cannot be denied, but that there was a Purchase intended to be made under this Fine, and that the Parties were willing to pass away their Estate with the least Hazard that might be to themselves; neither can it be imagined that they intended to defeat this Purchase as soon as it was made, which they must do if this Fine works a Forfeiture; for then he in Remainder in Tail is entituled to a present Entry, and so the Estates for Life which the Baron and Feme had are lost, and there was a Possibility also of losing the Reversion in Fee, which the Tenant in Tail after his Entry might have barred by a Common Recovery.

And had not the Parties intended only to pass both the Estates, which they lawfully might pass, why did they levy this Fine sur concessit? They might have levied a Fine sur Conusance de droit come ceo, &c. and that had been a Disseisin.

Besides, what Need was there for them to mention any Estate which they had in these Houses, if they had intended a Disseisin? But this being done, such a Construction is to be made as may support the Intent of the Parties; and it would be very unreasonable, that what was intended to preserve the Estate should now be adjudged to work a Disseisin so as to forfeit it; and such a Disseisin upon which this collateral Warranty shall operate and bar the Estate in Remainder.

And therefore no more shall pass by this Fine than what lawfully may; and rather than it shall be construed to work a Wrong, the Estate shall pass by Fractions; for both the Estates of William Mitton for Life are not so necessarily joined and united by this Fine, that no Room can be left for such a Construction.

2. Such a Construction will not agree with the Nature and Words of this Fine. 'Tis true, a Fine as it is of the most solemn and of the greatest Authority, so 'tis of the greatest Force and Efficacy to convey an Estate, and the most effectual Feoffment of Record where 'tis a Feoffment, and likewise the most effectual Release where 'tis to be a Release.

But

But on a bare Agreement made in Actions between the Demandant and Tenant at the Bar, and drawn up there, the Judges will alter and amend such Fines, if they did not in all Things answer the Intention of the Parties.

24 Ed. 3. 36.

'Tis agreed, that Fines can work a Disseisin when they can have no other Interpretation, as if Tenant pur auter vie levy a Fine to a Stranger for his own Life, 'tis more than such a Tenant could do, because his Estate was during the Life of another, and no longer.

Postea.

So a Fine Sur Conusance de droit, &c. implies a Fee, which being levied by any one who has but a particular Estate will make a Disseisin.

But this Fine Sur concessit, has been always taken to be the most harmless of all others, and can be compared to nothing else than a Grant of totum statum suum & quicquid habet, &c. by which no more is granted than what the Cognisor had at the Time of the Grant, and so it hath been always construed.

Indeed there is a Fine Sur concessit, which expresses no Estate of the Grantor, and this is properly levied by Tenant in Fee or Tail; but when particular Tenants pass over their several Estates, they generally grant totum & quicquid habent in Tenementis prædictis, being very cautious to express what Estate they had therein.

When this Fine Sur concessit was first invented, the Judges in those Days looked upon the Words quicquid habent, &c. to be insignificant, and for that Reason in Anno 17 Ed. 3. 66. they were refused: The Case was; Two Husbands and their Wives levied such a Fine to the Cognisee, and thereby granted totum & quicquid habent, &c. which Words were rejected, and the Judge would not pass the Fine, because if the Party had nothing in the Land, then nothing passed; and so is 44 Ed. 3. 36. By which it appears, that the Judges in those Times thought these Fines did pass no more than what the Cognisor had; and for this, there are multitude of Authorities in the Year-Books.

Now these Words cannot have a Signification to enlarge the Estate granted, they serve only to explain what was intended to pass; for in the Case at the Bar, if the Grant had been totum & quicquid habent in Tenementis prædictis, there would have been no Question of the Estate granted; but the Cognisors having granted Tenementa prædicta, they seem by these subsequent Words to recollect themselves, viz. Totum & quicquid habent in Tenementis prædictis.

Object.

Object. But it may be objected, That the Limitation of the Estate, viz. durante vita eorum & alterius eorum diutius viventis, works a Disseisin, because by those Words two Estates for Life pass entire in Possession, whereas in truth there was but one Estate for Life of the Husband in Possession; and therefore this was more than they could grant, because the Estate Tail came between the Estate which the Husband and Wife had for their Lives, and for the Survivor of them, and the Estate which the Husband had for his own Life.

And this is farther enforced by that Rule in Law, That Estates shall not pass by Fractions; for otherwise there can be no Reason why they should not thus pass.

Answ. But this Rule is very fallible, and not so much to be regarded; 'tis true, the Rule is so far admitted to be true, where without Inconveniency Estates may pass without Fraction; but where there is an Inconveniency it may be dispensed withal, it being such an Inconveniency as may appear to the Judges to make the Thing granted to go contrary to the Intent of the Parties.

And that such Interpretations have been made, agrees with the Third Reason proposed in this Case, viz. That it hath received Countenance by Judicial Opinions and Determinations in former Judgments, 14 E. 4. 4. 27 H. 8. 13. 1 Co. 67. Bredon's Case, which was thus; Tenant for Life, Remainder in Tail to A. Remainder in Tail to B. Tenant for Life, and he in the first Remainder levied a Fine Sur Cognisance de droit come ceo; 'twas adjudged, that this was no Discontinuance of either of the Remainders, because each of them gave what he might lawfully, viz. The Tenant for Life granted his Estate, and the Remainder-Man passed a Fee-Simple determinable upon his Estate Tail, and yet each of their Estates were still divided. 1 Roll. Abr. Lit. I. Pl. 4. 1 Inst 45. 2 Cro. Car. 406.

On the other Side it was said, That in all Cases where the Person who hath a particular Estate takes upon him either by Feoffment in Pais, or by Fine, which is a Feoffment on Record, to grant a greater Estate than he hath (as in this Case is done), though possibly the Estate of the Grantee may determine before that of the Grantor, yet 'tis a displacing the Reversion; as if a Man has an Estate for Ten Lives, and makes a Grant for the Life of another; here is a Possibility, that the Estate which he granted may be longer than the Estate he had in the Thing granted, because one Man may survive the Ten, and for that Reason 'tis a divesting.

1. In this Case, the Estate which the Husband and Wife had, is to be considered.

2. What they granted.

And by comparing of these together, it will appear whether they granted more than they had: The Husband and Wife had an Estate for the Life of the Wife, and (after the Estate-Tail) the Husband had an Estate for his own Life; now they grant an Estate for the Life of the Husband and Wife, and the Survivor, What is this but one entire Estate in Possession? No other Interpretation can be agreeable to the Sense of the Words; for if it had been granted according to the true Estate which each had, then it should have been, first for the Life of the Wife, and, after the Tail spent, then for the Life of the Husband.

The next Thing to be considered is, Whether the Estate shall pass entire, or by Fractions? And as to that, I need say no more than only to quote the Authority of that Judgment given in Garret *and* Blizard's Case, 1 Roll. Abr. 855. which is shortly thus, viz. Tenant for Life, Remainder for Life, Remainder in Tail, Remainder in Fee to the Tenant for Life in Remainder; this Tenant for Life in Remainder levies a Fine come ceo, &c. it was adjudged a Forfeiture of his Estate for Life, so that the Remainder Man in Tail might enter after the Death of the Tenant for Life in Possion; for it shall not be intended that he passed his Estate by Fractions, viz. an Estate in Remainder for Life, and a Remainder in Fee Expectant upon the Estate Tail, but one entire Estate in Possession; and 'tis not like the Authority in Bredon's Case, for there the Estate for Life and the Estate Tail followed one another.

Next it is to be considered, Whether after they granted omnia illa Tenementa; the subsequent Words, & totum statum suum, &c. do not come in by Way of Restriction, and qualifie what went before.

But those subsequent Words are placed in this Fine, not by Way of Restriction, but of Accumulation.

Litt. 345. In Littleton, Sect. 613. 'tis said, That if Tenant in Tail grants all his Estate in the Tenements, Habendum all his Estate, &c. in this Case the Alienee hath but an Estate for the Life of the Tenant in Tail; and 'tis observable, that totum statum in the Case put by Littleton, is both in the Premisses and the Habendum: But if I will grant Tenementa prædicta in the Premisses, and then make another Limitation in the Habendum, there totum statum & quicquid, &c. can make no Restriction, if it should, it will spoil most Conveyances.

It is agreed, That if those Words had been omitted in this Case, then by this Fine the Reversion would be displaced, and therefore much Weight is laid upon these Words to explain the Meaning of the Parties thereby, and that when they granted Tenementa prædicta, they meant totum statum, &c.

But

But here is no Ground for such an Interpretation; 'tis an entire Grant of the Houses by the Words Tenementa prædicta; and the subsequent Words shall never be allowed to make such a Restriction which shall overthrow the Frame of the Deed.

If a Man who has no Estate in the Land passes it by Deed, this shall work against him by Way of Estoppel; and these Words Totum & quicquid, &c. which are usual in all Conveyances, shall make no Alteration of the Law; for if such Construction should be made of these Words, as hath been objected, then in all Deeds where they are inserted, if it happen that the Party hath no Estate, or a void Estate, nothing passes; and then Covenants, Estoppels, and Warranties, would be no Securities in the Law.

2. These Words Totum & quicquid, &c. come in a distinct Clause of the Grant; the precedent Words are, Tenementa prædicta & totum statum & quicquid, &c. reddiderunt, which are Two Parts, a Grant and a Release, and have no Dependance upon each other, being distinct Clauses, and therefore these Words shall not be any Restriction of the former; but if one Clause be carried on with a Connexion, so as 'tis but an entire Sentence, in such Case a Man may restrain either general or particular Words, Hob. 171. in Stukely *and* Butler's Case.

3. Admitting these Words are a Restriction of the former, yet the Estate is so limitted, that if the first Words were out of the Case, this later Clause he said was enough for his Purpose, for the Grant is not in the usual Words by which Estates pass, viz. Estate, Right, Title, Interest, but Totum & quicquid, &c. for the Lives of the Grantors and the Survivor, which shews that they took upon themselves to grant for a longer Time than they had in Possession; if they had only granted it for both their Lives, they might have some colourable Pretence.

4. 'Tis apparent from the Clause of the Warranty, that the Intent of the Parties was to grant an Estate expresly in Possession for the Lives both of the Husband and his Wife; for 'tis that which the Grantee shall hold, &c. during their Lives and the longest Liver.

Object. The Case of * Eustace *and* Scaven has been objected: 'Tis reported in 2 Cro. 696. which is, Feme-Covert and A. are Jointenants for Life, the Husband and Wife levy a Fine to A. the other Jointenant, and grant the Land and Totum & quicquid habent, &c. to him during the Life of the Wife with Warranty, the Wife survives A. her Companion; Adjudged, that these Words Totum & quicquid shall not enure by Way of Grant and Severance of the Jointure of the Moiety, for then there would be an

* 2 Rol. Abr. 36, 403.

Occupancy; but they are Reſtrictive only to the Eſtate of the Wife, and ſhall enure by Way of Releaſe to A. ſo that after his Death he in Reverſion may enter.

Anſw. It would not be a Queſtion in that Caſe, whether theſe Words were Reſtrictive or not, for nothing was granted but what might lawfully paſs, viz. during the Life of the Wife the other Jointenant; neither was there any Streſs laid on thoſe Words; for Mr. Juſtice Jones, who was a Learned Man, and reported the ſame Caſe, fol. 55. hath made no Mention thereof, but hath wholly omitted thoſe Words, which he would not have done if the Caſe had depended upon them.

2. Object. Next, the Form of this Fine has been objected, and a Precedent was cited, Raſt. Entr. 241. where ſuch a Fine was levied, and nothing paſſed but for the Life of the Conuſor.

Anſw. But no Authority can be produced, where a Man that had an Eſtate for Life in Poſſeſſion, and another in Remainder, and granted by the ſame Words, as in this Caſe, but that it was a Forfeiture.

3. Object. That the Law will not make a Conſtruction to work a Wrong, and therefore if Tenant for Life grant generally for Life, it ſhall be interpreted during the Life of the Grantor.

Anſw. That Caſe is without expreſs Words, or ſhewing any Time for which the Grantee ſhall have the Thing granted; and therefore the Law reſtrains it to the Life of the Grantor, becauſe it will not make Words which are doubtful and of incertain Signification to do any Wrong: But where there are expreſs Words as in this Caſe, no other Conſtruction can be made of them, but that an Eſtate in Poſſeſſion was thereby intended to paſs.

4. Object. That this Fine and Grant muſt be conſtrued to enure according to the Intent of the Parties, ut res magis valeat, and they never intended to make a Forfeiture.

Anſw. Certainly no Man ever intended to make a Forfeiture of his own Eſtate, thoſe are generally the Effects of Ignorance, and not of the Will, as the Caſe of Gimlet *and* Sands, Cro. Car. * 391. where Tenant in Fee makes a Feoffment to Two to the Uſe of himſelf for Life, then to the Uſe of his Wife for Life, Remainder in Tail to his Son and Heir, Remainder to his own right Heirs; and afterwards he made another Feoffment to Smith with Warranty; the Mother and Son join in another Feoffment, adjudged that this was a Forfeiture of her Eſtate for Life, though ſhe had no Notice of the Warranty made by her Huſband; for the Feoffment made by him was a Publick Act upon the Land, and ſhe ought to have taken Notice of it; and though by her joining in the Feoffment with her Son, ſhe did not intend

* 1 Roll. Abr. 856.

to

to forfeit her Estate, yet the Law adjudges according to what is done: But in the Case at Bar, the Intention of the Parties may be collected by the Act done; and there is great Reason to presume, that the Parties thereby intended to displace the Reversion; for the Husband joining in the Fine, and in the Warranty, if it was no Divesting, the Warranty is of no Use.

Another Objection has been only mentioned, which is, That admitting this should amount to a Displacing, if the Estate had been in Possession; yet in this Case it would not, because it was prevented by the Lease for Years in being.

But that cannot hinder the Execution of this Fine; 'tis a Fine sur concessit, which is Executory in its Nature, and doth not pass any Estate, or take any Effect 'till executed, and so is the Book, 41 5. 3. 14. b.

But in this Case the Fine was executed, which may be by Matter in Pais, as well as by Scire facias, and as to this Purpose, may be executed by the Entry of the Conusor, without suing out any Execution, 38 Ed. 3. Brook Tit. Scire facias 199. 1 Rep. 106. Dyer 376. b.

If there had been a Fine executed, there would have been little Doubt left in this Case; and by the Attornment of the Lessee for Years, it must be admitted that this Fine was executed, as 8 Ed. 3. fol. 44. For a Fine of a Reversion may be executed to all Purposes by the Attornment of the Lessee for Years; and if so, when a Fine Executory is once executed, 'tis as good as a Fine sur Conusance de droit come ceo, to make a Forfeiture of the particular Estate.

Where a Feoffment is made, and a Lease for Years is in being, the Feoffment is not good; because in such Case there must be a present Transposition of the Estate, which is hindred by the Lease. Postea, Moor *and* Pitt.

But in case of a Fine, which is a Feoffment upon Record, a Lease for Years is no Impediment or Displacing of the Reversion; for if Tenant in Tail, Expectant upon a Lease for Years, levy a Fine, 'tis a Discontinuance of the Tail, and notwithstanding this Lease, the Fine has such an Operation upon the Freehold, that it displaces the Reversion in Fee, Co. Litt. 332. And therefore if a Lease for Years prevents not a Discontinuance, it will much less hinder a Displacing in this Case.

But no Judgment was given now in this Case; another Matter being debated, whether the Plaintiff could have Judgment, because he was barred by the Statute of Limitations; for it did not appear that he had been in Possession for Twenty Years past,

paſt, and the Verdict hath found any Claim, or that the Plaintiff was within the Proviſo of the Act.

Waterfield *verſus* the Biſhop of *Chicheſter.*

Oath *Ex Officio* not to be adminiſtred.

A Prohibition was granted laſt Eaſter-Term to the Biſhop of Chicheſter, upon a Suggeſtion made by Waterfield, that he being choſen Church-Warden of the Pariſh-Church of Arundel, in the County of Suſſex, the Biſhop tendered him an Oath ex Officio, which was, That he ſhould Preſent every Pariſhioner who had done any Offence, or neglected any Duty mentioned in certain Articles contained in a printed Book delivered to him; ſome of which Articles concern the Church-Warden himſelf, and ſo in effect he was to ſwear againſt himſelf in caſe of any Default, which is expreſly againſt the Statute of 13 Car. 2. cap. 12. which prohibits any Perſon having Eccleſiaſtical Juriſdiction to adminiſter the Oath ex Officio, or any other Oath, whereby the Perſon to whom 'tis adminiſtred may be charged to accuſe himſelf of any Criminal Matter, whereby he may be liable to any Cenſure or Puniſhment; and becauſe the Biſhop had excommunicated him for refuſing ſuch Oath, he prayed a Prohibition, which was granted, quoad the compelling him to make any Anſwer to the ſaid Articles concerning himſelf, and the Excommunication was diſcharged.

Sid. 232.

But now upon the Motion of Serjeant Brampſton, a Conſultation was awarded, becauſe it appeared by the Affidavit of the Commiſſary who tendred this Oath, and likewiſe by the Act of the Court, that he was excommunicated for refuſing to take the Oath of a Church-Warden according to Law, which was the only Oath tendred, and therefore the Ground of the Prohibition being falſe, a Conſultation was awarded.

In this Prohibition it was recited, That the Biſhop cannot give an Oath but in Two Caſes, viz. in Matters Teſtamentary, and Matrimonial, whereas they have Authority in many Caſes more; 'tis true alſo, that until his Juriſdiction was increaſed by Act of Parliament, he could hold Plea in none but thoſe Two Cauſes, but by the Statute De circumſpecte agatis, and of Articuli Cleri, he may now hold Plea in many other Caſes.

2 Inſt. 487. 537.

The Biſhop informed the Lord Chief Juſtice, that the Plaintiff Waterfield had cauſed 2000 of the Prohibitions to be printed in Engliſh, and had diſperſed them all over the Kingdom, inti-

intituling them a true translated Copy of a Writ of Prohibition, granted by the Lord Chief Justice, and other the Justices of the Court of Common Pleas, in Easter-Term, 1676. against the Bishop of Chichester, who had proceeded against and excommunicated one Thomas Waterfield, a Church-Warden, for refusing to take the Oath usually tendred to Persons in such Office; by which Writ the Illegality of all such Oaths is declared, and the said Bishop commanded to take off his Excommunication: And this was declared by the Court to be a most Seditious Libel, and gave Oyer to enquire after the Printer, that he might be prosecuted.

Eleanor Plummer *versus Sir* Jeremy Whitchot, *Intr.* Trin. 27 *or* 28 Car. 2. *Rot.* 301. in *B. R.*

IN an Action of Debt for an Escape: Upon Nil debet pleaded, the Jury found a Special Verdict; upon which the Case was this, Viz. That Sir Jeremy Whitchot was seised in Fee of the Office of Warden of the Fleet, and of several Messuages thereunto belonging, and being so seised, did make a Grant thereof to one Duckenfield for Life, and for the Lives of Three more. Duckenfield by Rule of Court was admitted into the said Office, being approved by the Court, and esteemed a Man of an Estate. He suffers a Prisoner afterwards to escape, and being not able to make the Plaintiff Satisfaction, this Action was brought against Sir Jeremy Whitchot, the now Defendant; and whether he was chargeable or not with this Action, was the Question.

Debt for Escape lies against the Warden of the *Fleet*, as Superior, the Grantee for Life being insufficient. Jones 60. 1 Vent. 314.

Wallop, who argued for the Plaintiff, said, That he would not take up any of their Time to make a Narrative of Imprisonment for Debt, or what Remedy there was for Escapes at Common Law, and what Remedy by the Statute; but supposing an Action of Debt will lie, whether it be by the Statute of Westm. 2. cap. 11. (for at the Common Law, before the making of that Act, an Action of Debt would not lie against the Gaoler for an Escape, but a Special Action on the Case, grounded on a Trespass) or whether this Action lay against the Defendant by the Statute of 1 R. 2. cap. 12. which gives it against the Warden of the Fleet, who in this Case had not the actual Freehold in Possession, but the Inheritance, and not the immediate Estate, but the Reversion, is the Question.

Ex parte Quer. Sid. 306, 307. 2 Inst. 382.

The Office of the Warden of the Fleet, may be taken in Two Capacities, either as an Estate, or common Hereditament, wherein

wherein a Man may have an Inheritance, and which may be transferred from one to another; or as a Publick Office, wherein the King and the People may have a Special Interest.

As 'tis an Inheritance transferrable, 'tis subject to the Rules of Law in Point of Descent, and is demisable for Life, in Fee, Tail, Possession or Reversion, and in many Things is common, and runs parallel with other Estates of Inheritance. 'Tis true, he cannot grant this Office for Years, not for any Disability in the Grantor, but in Respect of the Matter and Nature of the Thing granted, it being an Office of Trust and Personal, for otherwise it would go to the Executor, which is inconvenient, 9 Co. 96. Sir George Reynell's Case.

To enquire what Superiority the Reversioner hath over the particular Estate, is not to the Point in Question; but there is such an Intimacy and Privity between them, that in Judgment of Law they are accounted as one Estate.

And therefore Littleton, Sect. 452, 453. saith, That a Release made to a Reversioner shall aid and benefit him who hath the particular Estate, and likewise a Release made to the Tenant of the Freehold shall enure to him in Reversion, because they are Privies in Estates; so that these Two Estates in the Case at Bar make but one Office.

This is a Publick Office of great Trust, and concerns the Administration of Justice; and therefore 'tis but reasonable to admit the Rule of Respondeat Superior, lest the Party should be without Remedy; and the rather, because Execution is the Life of the Law, 39 H. 6. 33.

He who is in the Office as Superior, whether it be by Droit or Tort, is accountable to the King and his People, and this brings him within the Statute of Westm. 2. cap. 11. or 1 R. 2.

If the Defendant had granted the Office in Fee to Duckenfeild before any Escape had been, and the Grantee had been admitted, the Defendant then had been discharged; or if he die before or after the Action brought, and before Judgment, Moritur Actio cum Persona, for if he had not reserved something he could not be charged, and if he had parted with the Inheritance the Privity had been gone, but by reserving that, he hath made himself liable; for now he is Superior, he may exact Homage and Fealty, and the particular Tenant is said to be Attendant upon the Reversion, and these are Marks of Superiority.

And this Rule of Respondeat Superior holds not only between the Principal Officer and his Deputy, and between the Master and his Servant, but in many other Cases one is to be answerable for another; as,

1. Where

1. Where a Man has Power to elect an Officer, he is chargeable; so the County hath Power to elect Coroners, and if they fail in their Duty, the County shall be charged; for by Reason of the Power they had to elect, they are esteemed Superiors, 2 Inst. 175. 4 Inst. 314.

2. Where one Man recommends another to an Office concerning the King's Revenue, the Person who recommends is liable, if the other prove Insufficient; and for this there is a notable Case 30 E. 3. 6. 'Tis Porter's Case, cited in the Case of the Earl of Devonshire, 11 Co. 92. b. Where Porter being Master of the Mint, covenanted with the King to deliver him Mony within Eight Days, for all the Bullion delivered ad Cambium Regis to coin, which he did not perform, Et quia Walwyn & Picard duxerunt & præsentaverunt the said Porter, ideo consideratum est quod onerentur versus Dominum Regem: And why not the Defendant in this Case, who præsentavit the said Duckenfield to the Court tanquam sufficientem, the Reason being the same? And the King is as much concerned in the ordering this Court of Justice, as in the ordering of his Coffers; for as the Treasure is Nervus Belli, so the Execution of the Law is Nervus Pacis. 4 Inst. 466.

3. In the Case of a dependant Officer, though he is a proper Officer and no Deputy, the Person who hath the Reversion shall answer, as in 32 H. 6. 34. The Duke of Norfolk, who had the Inheritance of the Marlshalsea, was charged for an Escape suffered by one Brandon, who was Tenant for Life, in Possession of the said Office; and there is great Reason it should be so; for when a Principal Officer may make an Inferior Officer, who afterwards commits a Forfeiture, the Superior shall take Advantage of this Forfeiture, and 'tis as reasonable he should be answerable for his Miscarriage, Cro. Eliz. 384. The Earl of Pembrook against Sir Henry Berkley. 2 Inst. 382. 9 Rep. 98. Dyer 278. b. Poph. 119.

And therefore admitting the Defendant is out of the Statute, yet he is within the Maxim of Respondeat Superior, which is not grounded upon any Act of Parliament, as appears in the Case of the Coroner, and the Statute of West. 2. And all other Acts which inculcate this Rule, are but in Affirmance of the Common Law; and this is not only a Rule of the Common, but also of the Civil Law, which is served with the Equity of this Maxim in Cases of like Nature; and since 'tis purely Remedial, such a Construction ought to be made as may most advance the Remedy, 2 Inst. 466.

In the Case of Morse and Slue, lately in this Court; the Question was, Whether a Master of a Ship should be charged upon 1 Ventr. 190. 238.

the Common Custom of England, for negligently keeping Merchants Goods? And adjudged that he was, though robbed: Lex Mercatoria makes a Provision for it, for the Remedy against the Master is most direct and immediate; that against the Owner is collateral in Favour of the Merchant, to whom datur Electio; and therefore that the Interest of the Merchant might be served, the Law in that Case provides a double Remedy.

And in Linwood, lib. 3. De Clerico non residente, f. 73. verbo Vicarius; 'tis said, That in the same Church there may be a Rector and a Vicar, and the Cure of the Church may be divided between them; the Vicar is not the Deputy of the Rector, but hath a Distinct Office from him; and as the Temporalities of the Vicar are but a Derivation from the Benefice of the Rector, so his Cure is derived from that of the Rector also.

In like manner, Duckenfield here is not a Deputy to the Defendant, but an immediate and proper Officer, and the habitual Care and Custody is in him, which is enough to bring him within the Rule of Respondeat Superior.

These Instances were given, because this is not only a Maxim in England, but is of Foreign Production, and adapted to the Rules of Common Law, Vide Bracton, Fleta, Selden.

The Statute de Scaccario, 51 H. 3. enacts, That if any Man be received into Office in the *Exchequer* without the Treasurer's Licence, or if he hath such Licence and doth Trespass, he shall be punished according to his Trespass, if he have whereof; and if he have not, then he who put him in the Office shall be charged, and if he be not sufficient, his Superior shall be charged; so that they shall all answer in their several Stations. And this Statute was made in Affirmance of the Common Law: If therefore the Superior of a Superior should answer, why shall not the Defendant in this Case answer for his Substitute? For though the Warden is not sworn to appoint one who is sufficient to satisfie, he is bound to do it; and 'tis no Argument to say that he is discharged, because Duckenfield was appointed by the Court; for that is a Work of Supererrogation, which is left in the Discretion of the Court, and may be done or omitted as they shall think necessary, but is not conclusive, 39 H. 6. 34. especially since the Jury have not found that the Court took any Examination whether he was Sufficient or not; but that he had forfeited his Office, having wilfully suffered a Prisoner to escape, and then the Defendant is or may be the actual Officer, and having taken Security, ought to be charged.

Sir

Sir William Jones, who argued on the other Side, before he spoke to the Case, endeavoured to remove a Doubt upon the Special Verdict, which found that the Defendant had taken Security from Duckenfield to indempnifie him from Escapes. Ex parte Def.

This, says he, might be an Argument at a Nisi Prius to induce a Jury to find Damages, but could not make a Man chargeable who was not so before.

2. Though the Defendant had a Covenant from Duckenfield to pay 1500 l. per Annum to him, yet that will not make him more liable than if nothing had been to be paid; neither did he lay any Weight upon it, that the Defendant had any Notice of the Insufficiency of Duckenfield, for if he is chargeable, he is bound to take Notice at his Peril; and no Body can believe that the Court of Common Pleas is chargeable, for that was mentioned in the Argument for the Plaintiff, that the Superior of a Superior shall be charged where he is insufficient; neither did he insist upon the Rule in the Common Pleas, by which Duckenfield was admitted: But he considered,

1. Whether the Defendant was chargeable by the Statute of Westm. 2. cap. 11.

2. If he could clear him from that Statute, whether he was chargeable at the Common Law, or by any other Statute.

And he said, That he was not chargeable by the Statute of West. 2. which gives an Action of Debt against the Gaoler for an Escape: Many Authorities might be cited to prove, that where a Man is in Execution on an Action of Debt, that such an Execution is not within that Statute, 7 H. 6. 5. Bro. tit. Escape pl. 9. Pl. Com. 35. It was doubtful there, how a Gaoler became chargeable for the Escape of a Man who was in Execution for Debt; but were he in Execution for Matter of Accompt, he is chargeable by the express Words of the Statute, which are Caveat sibi Vicecomes & Custos Gaolæ; and the Parliament in 1 R. 2. did not think the Warden chargeable, for if they did, to what Purpose was it to make the Warden of the Fleet liable to an Action of Debt for an Escape of a Man in Execution for Debt, if he was chargeable before by that Statute of Westm. 2. This was urged, to shew that at that Time it was not clear.

But because there are Authorities that seem another Way, he did not affirm or deny it after such Varieties of Opinions, but proceeded to argue these Two Points:

1. That the Rule of Respondeat Superior doth not extend to this Case.

2. That a Reversioner is not a Superior.

Postea.

1. The Statute de Donis is by some called the Statute of great Men, because the Intent of it was for the Preservation of their Estates; and this Statute being made in the same * Year, seems also to have a particular Regard to the Lord, to give him a quick and more severe Remedy against his Servant and Bayliff than he had before; for it makes him in Effect his own Judge against him in Cases of Accompt, because it gives him Authority to assign Auditors, and such as he appoints must stand, and the Servant has no Remedy but by Writ * Ex parte talis in the Exequer; yet no Man ever thought that by the Equity of this Statute the same may be done in an Action of Debt, and therefore the Difference in the Proceedings between Actions of Accompt and Debt, seems to imply that an Action of Debt is not within the Rule of Respondeat Superior.

* 13 Ed. 1.

* F. N. B. 129.

2. There is a great Difference between the Restraint of Prisoners in Execution for Debt, and those who are imprisoned by this Act for Arrear of Rent, which directs that they shall be arrested &c. & carceri mancipentur in ferris; but this the Gaoler could not have done at the Common Law; neither was it ever practised or allowed by the Law that a Prisoner should be so used, who is in Execution for Debt, unless he be unruly, and endeavour to escape; but 'tis expressly against the Law to do it where there is no such Reason, because a Prison is for the safe Custody of Men, and not to punish them, 1 Inst 260. a. So that it appears by this, That a stricter Remedy was provided for Executions in Accompt than for those in Debt.

3. There are certain Persons also, who are made chargeably by this Statute when the Execution is in Accompt, who cannot be charged in Debt; for the Statute enacts, That if the Party escape, the Officer in whose Custody he is shall answer, *sive infra Libertatem sive extra*; so that the Gaoler shall be charged, whether he be of a Franchise or of the County at large; but if a Man is in Execution for Debt, and then escapes, the Gaoler is not liable, but the Sheriff; though the * Gaoler hath the Custody of the Body of One, whom the late Sheriff did not deliver over to the present Sheriff: So that in this also there is Difference upon this Statute between Actions of Accompt and Actions of Debt, and therefore the Clause therein, of Respondeat Superior, being made upon a particular Occasion only in the Case of Accompt, shall not be extended to other Matters, and can in no wise influence this Case, which for other Reasons cannot be governed by that Rule, if extended to all who have Power to depute an Officer, and thereby give him an Interest, or to appoint one for a Time.

* 3 Co. 71. Westby's Case.

2. Point.

2. Point. 1. Because he in Reversion is not in propriety of Speech a Superior; for 'tis not said, that a Reversioner after an Estate for Life is Superior, and of more Accompt in the Law than he who hath the particular Estate; but on the contrary, he who hath the Freehold is of greater Accompt and Regard in the Law, than the Reversioner after him; and if (as it hath been objected) both make but one Estate, then there can be no Superiority, and it would be very hard and difficult for any Man to prove, that any Attendancy is made by the Tenant for Life upon him who hath the Reversion.

2. Here is Room enough within the Statute to satisfie that Word Superior, by a plain and clear Construction, without bringing in the Reversioner; for if the Sheriff makes a Deputy, or a Lord makes Bayliff of a Liberty, the Sheriff and the Lord are properly the Superiors.

3. This Word Superior is used in the Statute made the same year with this, cap. 2. in Signification agreeable with the Case in Question; for it recites, That where Lords of Fees distrain their Tenants for Rents and Services, and they having replevied their Cattle no alien or sell them, so that a Return cannot be made; then it provides, That the Sheriff or Bayliff shall take Pledges to prosecute the Suit before they make Deliverance of the Distress, and if the Bayliff be not able to restore, (that is, if he take insufficient Pledges) the Superior shall answer, by which the Parliament could mean no other than the Lord of that Liberty; for if it should be otherwise, there would be no End of Superiors; as if there is a Bailiwick in Fee of a Liberty, and the Bayliff thereof grants it for Life, in this Case there are Two Superiors, for the Lord of the Bayliff is one, and the Bayliff himself is another, which cannot be, 2 Inst 382.

There is a Congruity in Law, in saying, the Sheriff and Lord are Superiors, but there can be none in making the Reversioner a Superior.

The Lord may lose the Liberty, if his Bayliff for Life or in Fee commit a Forfeiture, as by not attending the Justices in Eyre; but a Reversion cannot be lost by the Forfeiture of the Tenant for Life; if the Bayliff make an ill Execution of a Writ, or suffer the Party to Escape, the Lord shall answer; so if the Marshal of England appoint a Marshal, there may be a Forfeiture of his Office, because 'tis but still the same Office; and therefore the Case in Cro. Eliz. 386. where 'tis said, If an Office be granted for Life, the Forfeiture of Tenant for Life shall be the Forfeiture of the whole Office, is mistaken; for in Moor pl. 987. 'tis held otherwise; and upon the true Difference between a Deputy and a

Grantee

Grantée for Life; for in the First Case there may be a Forfeiture of the Superior, because 'tis still but the same Office; but in the other Case the Superior shall not forfeit for any Misdemeanour of the Grantée for Life, because he hath the Freehold of the whole Office, and the other nothing but the Reversion; and therefore if the Defendant be liable in this Case, 'tis in respect,

2. That he hath granted the Estate.

2. That he hath the Reversion or Residue after the Life of the Grantee.

He cannot be charged in respect that he hath granted the Estate, because the Freehold is gone, and in another; neither can he be charged in respect of the Reversion, because then not only his Heir, but the Assignée of the Reversion will be chargeable also, which cannot be.

As to the Second Point of this Argument; if the Defendant is not chargeable by this Statute, he is not to be charged at the Common Law.

Sid. 306, 397. 2. Because the Common Law doth not give an Action of Debt for an Escape, but an Action on the Case only; neither doth it give any Remedy but against the Party offending.

As to the Case that hath been objected upon the Statute de Scaccario, where the several Officers in the Exchequer shall answer in their Degrées of Superiority, that cannot be applicable to this Case, because there can be no Proportion between Things which concern the King's Revenue and Prerogative, and those of a common Person.

The Cases of the Coroner and the Sheriff, and of the Recommending of a Receiver to the King, are not like this Case, because the King cannot inform himself of the Sufficiency of the Party recommended, and therefore 'tis but reasonable that he who recommends should be liable; and can it be said, That when the Defendant was about to sell this Office to one Norwood (which he hath since done) that if a Stranger had recommended Norwood, and he had proved insufficient, that the Stranger would have been liable?

As for the Civil Law, and the Authorities therein cited to govern this Case, he did not answer them, because they judge after their Law, and the Common Lawyers after another Way.

This Office hath been granted Time out of Mind for Life, and no Doubt but many Escapes have been made, but never was any Action brought against him in the Reversion before now.

The Court of Common Pleas always examine the Sufficiency of the Grantée for Life, which shews that in all Succession of Ages the Opinions of Learned Men were, That no Escape could be brought

brought against the Reversioner; for if so, what Need is there of such Examination? This was urged, to shew that the Proceedings of that Court did not alter, but interpret the Law.

But admitting the Case of the Duke of Norfolk to be Law, yet it concerns not this, because the Sub-Marshal there was taken as a Deputy; but there is no such Officer as a Sub-Warden, for Duckenfield had it for Life.

And then a Deputy being a Person removeable at Pleasure, will not be so considered in Law, as one who hath a more fixed Estate; for having nothing to lose, it cannot be intended that he will be so careful in the Execution of his Office as the other; and therefore 'tis reasonable in such Case that the Superior should answer: But he who hath a Freehold for Life, hath an Estate of some Value in the Law which he cannot be supposed easily to forfeit, and therefore 'tis reasonable that he alone should be liable for his own Miscarriages; for if the Defendant should be charged, by the same Reason the Grantee of the Reversion may be charged, who is altogether an innocent Person, and so may be liable to a vast Sum for the Fault of another; for which Reasons he prayed Judgment for the Defendant.

The Court delivered no Opinion this Term, but took Time to advise; and afterwards in Easter Term following, Rainsford Chief Justice delivered the Opinions of Twisden, Wild and Jones, Justices, who said they were all agreeing in the main Point, but thought the Verdict imperfect, and not to warrant the Plaintiff's Case; for he declared that at the Time when the Grant was made to Duckenfield, when the Commitment was, and when the Escape was suffered, and ever since, that Duckenfield was insufficient and not able to answer the Plaintiff; but the Jury in the Special Verdict do not find the Insufficiency at that Time when this Action was brought. Judgment.

But as to the main Question, they were of Opinion that the Defendant was Superior, and that he is chargeable for this Insufficiency of Duckenfield; but if he had been sufficient when the Plaintiff brought this Action, it might have been otherwise: But his Inability being fully averred in the Declaration, and the Defendant denying it, and the Jury having found nothing against it, but there being strong Suspicions of the Truth of the Fact, the Court would not make an Intendment to the contrary.

The Jury have found expressly, That Duckenfield was insufficient at the Time of the Escape, which was within Six Weeks of the Time when the Action was commenced; so that having once found him disabled, unless it appear that he was of Ability afterwards,

wards, the Court will not intend him ſo, but rather that he was Inſufficient at the Time of the Action brought; for there being ſtrong Surmiſes of it, and there being no Ground within the Record to intend him Sufficient, a Fact may be collected that is not found in the Verdict, Fulwood's Caſe, 4 Co.

The King *verſus* Moor.

Difference between a Prohibitory Clauſe, and a Clauſe which gives a Penalty in a Statute.

AN Information was brought upon the Statute of the 4th & 5th of Philip and Mary, cap. 8. which enacts, That if any Perſon, *&c.* above the Age of 14, ſhall after the Firſt Day of (*April* next after the making the Statute) unlawfully take a Maid or Woman unmarried, being within the Age of 16 Years, *&c.* the Party ſhall ſuffer Two Years Impriſonment, or pay ſuch Fine as ſhall be aſſeſſed in the *Star-Chamber*, and that the Defendant exiſtens ſupra ætatem quatuordecim Annorum did take a young Maid away unmarried, and kept her Three Days contra formam Statuti; upon which he was found Guilty, and now moved in Arreſt of Judgment.

1. It was ſaid for the Defendant, That this Court could not fine him upon this Statute, becauſe when the Informer entitles himſelf by a Statute, he muſt take the Remedy therein preſcribed; and ſo 'tis not like an Information at the Common Law, for in ſuch Caſe this Court might fine the Plaintiff.

2. It is not averred, That the Party offending was above the Age of 14 Years at the Time of taking, but only that he being above the Age of 14, ſuch a Day did take.

Where there are not Negative Words, the Court of *King's Bench* is not reſtrained. Mod. Rep. 34. Sid. 359. Poſtea.

Sir William Jones contra. If the Firſt Objection hath any Weight in it, 'tis to bring the Party to an Impriſonment for the Space of Two Years, which is a Puniſhment directed by that Statute; but the Fine is limited to the Star-Chamber, and thoſe Offences which were puniſhable there, are likewiſe to be puniſhed here, becauſe there are no Negative Words in this Statute to abridge the Authority of this Court, which is never reſtrained, but when the Statute directs, before whom the Offence ſhall be tried, and not elſewhere. It was the Opinion of my Lord Chief Juſtice Hales, That where there is a Prohibitory Clauſe in a Statute, and another Clauſe which gives a Penalty, if the Party will go upon the Prohibitory Clauſe, he is not confined to the Manner expreſſed in the Statute, but if he will go upon the Penalty, he muſt then purſue what the Statute directs.

The

The First Part of this Statute is but a Declaration of the Common Law; the Second Clause is introductive of a new Law as to the Court of Star-Chamber, but is not a Restriction as to this Court, which might have punished the Defendant if there had been no such Law. The first Clause is Prohibitory, viz. That it shall not be lawful for any Person to take away a Maid unmarried, and upon this Clause this Information is brought: The Second Clause is distinct, and directs the Punishment, viz. Upon Conviction to suffer Imprisonment for Two Years. Now by taking away the Court of Star-Chamber, this Prohibitory Clause is not repealed, upon which a Man may be indicted without demanding the Penalty; and the Statute having directed, that the Offence shall be heard and determined before the King's Council in the Star-Chamber, or before the Judge of Assise, and no Negative Words to restrain this Court; therefore the Chief Justice, who is the Judge of * Assise in the County of Middlesex, may hear and determine this Offence, and by consequence fine the Party if he be found guilty. * Cro. Car. 465.

As to the Second Objection, That it is not averred, that the Party offending was above the Age of 14 Years at the Time of the Taking, it had been better if it had been said, tunc existen' supra Ætatem quatuordecim Annorum: But notwithstanding 'tis well enough; for 'tis said, That being above the Age of 14 Years, such a Day he did take, &c. so that it cannot be otherwise but that he was of such an Age at the Time when the Maid was taken; and the Jury found him guilty contra formam Statuti; which may likewise be an Answer to the First Objection; for he being found guilty contra formam Statuti, if there be any other Statute which prohibits and punishes a Riot, this Information is as well grounded upon such, as upon this Statute of Philip and Mary, for 'tis expressly said, That the Defendant and others did unlawfully assemble themselves together, and riotose & routose made an Assault upon her, so that it shall be intended to be grounded upon such a Law, as shall be best for punishing the Offence.

The Court were of Opinion, That notwithstanding these Exceptions, the Information was good, and was not like the Case of an Indictment upon the Statute for a forcible Entry, That such a Day by Force and Arms the Defendant did enter into such a House, existen' liberum Tenementum of J. N. and if he doth not say tunc existen' the Indictment is naught, because the Jury may enquire of a Thing before it is done; but here the existen' being added to the Person, carries the Sense to the Time of the Offence committed. Curia. 2 Cro. 14610. 639.

The Statute of 1 R. 3. saith, That all Grants made by Cestui que Use being of full Age, shall be good against him and his Heirs, and 'tis adjudged 16 H. 7. that he need not shew when and where, but generally existen' of full Age, and upon the Evidence it must be so proved.

Where a Thing relates to the Condition of a Man, it shall be tried in the County where the Action is laid, and 'tis not necessary to say in what County he is a Knight or an Esquire; any Citizen and Freeman may devise his Land in Mortmain, by the Custom of London; 'tis enough to say in Pleading, existen' a Citizen and Freeman, without setting forth when and where.

If a Man be indicted for not coming to Church, 'tis enough to say existen' of the Age of Sixteen Years, he did not come to Church.

This is an Offence punishable at Common Law, 'tis malum in se. But admitting 'twas an Offence created by the Statute, there being no Negative Words to prohibit, this Court hath a Jurisdiction to punish this Offence, if the Star-Chamber had not been taken away; for the Party had his Election to proceed in this Court upon the Prohibitory Clause, and the Justices of Assise must be intended the Justices of Oyer and Terminer, Moor 564. Whereupon the Defendant was fined 500 l. and bound to his good Behaviour for a Year.

Brown *versus* Waite.

Entailed Lands forfeited for Treason. Jones 57. 1 Ventr. 299. 2 Lev. 169.

Upon a Special Verdict in Ejectment, the Case was, viz. Sir John Danvers, the Father of the Lessor of the Plaintiff, was in Anno Domini 1646. Tenant in Tail of the Lands now in Question; and was afterwards instrumental in bringing the late King Charles to Death, and so was guilty of High Treason, and died.

Afterwards the Act of Pains and Penalties, made 13 Car. 2. cap. 15. enacts, That all the Lands, Tenements and Hereditaments, which Sir *John Danvers* had the 25th Day of *March*, in the Year 1646, or at any Time since, shall be forfeited to the King.

And whether these entailed Lands shall be forfeited to the King by Force of this Act, was the Question.

Wallop, who argued for the Plaintiff, said, That the entailed Lands were not forfeited; his Reasons were,

1. These

1. These Lands entailed are not expressly named in that Act.

2. Tenant in Tail hath but an Estate for Life in his Lands, and therefore by these Words [All his Lands], those which are entailed cannot be intended; for if he grant Totum statum suum, only an Estate for Life passeth.

3. These Lands are not forfeited by the Statute of 26 H. 8. cap. 13. which gives the Forfeiture of entailed Lands in case of Treason; because Sir John Danvers was not convicted of it by Process, Presentment, Confession, Verdict, or Outlawry, which that Statute doth require, for he died before any such Conviction.

Sir Francis Winnington the King's Solicitor, argued contra, that entailed Lands are forfeited by the Act of Pains and Penalties; and in speaking to this Matter, he considered,

1. The Words of that Act.

2. How Estates Tail were created, and how forfeitable for Treason.

1. This Act recites the Act of general Pardon, which did not intend to discharge the Lands of Sir John Danvers and others from a Forfeiture.

2. It recites that he was guilty of High Treason.

3. Then comes the enacting Clause, Viz. That all the Lands Tenements, Rights, Interests, Offices, Annuities, and all other Hereditaments, Leases, Chattels, and other Things of what Nature soever of him the said Sir *John Danvers* and others, which they had on the 25th of *March* 1646, or at any Time since, shall be forfeited to the King, his Heirs and Successors.

2. As to the creation of Intails, there were no such Estates at the Common Law; they were all Fee-Simple Conditional, and post prolem suscitatam the Condition was performed for Three Purposes:

Viz. To alien, Co. Lit. 19. a. 2 Inst. 334.

To forfeit;

Or to charge with a Rent: And thus the Law continued 'till 13 E. 1. and there having been frequent Wars between King John and the Barons, the great Men then obtained the Statute de Donis to preserve their Estates, lest the like Occasion should happen again, in which 'tis only mentioned, That the Tenant in Tail should not have Power to alien; but it was well known, that if he could not alien, he could not forfeit; for before that Statute, as he might alien post prolem suscitatam, so the Judges always construed that he might forfeit, 5 Ed. 3. 14. for Forfeiture

and Alienation did always go Hand in Hand, 1 Co. 175. Mildmay's Case.

And from the making of that Statute, it always continued a settled and received Opinion, That Tenant in Tail could not alien, until by the 12th of Ed. 4. a Recovery came in, by which the Estate Tail may be docked, and which is now become a Common Assurance.

Then by the Statute of 4 H. 7. cap. 24. Tenant in Tail might bar his Issue by Fine and Proclamation, and all this while it was not thought that such Lands could be forfeited for Treason; which Opinion continued during all the Reign of H. 7. for though by his Marriage the Houses of York and Lancaster were united, yet the great Men in those Days thought there might be some Doubt about the Succession after the Death of H. 7. if he should die without Issue, and thereby those Differences might be again revived, and therefore no Endeavours were used to make any Alteration in the Law, 'till after the Death of H. 7. And after his Son H. 8. had Issue, those Doubts were removed, and being never likely to arise again, then the Act of 26 H. 8. was made, which gives a Forfeiture of entailed Lands in Cases of Treason.

The Inference from this will be, That all the Cases put before the 26th Year of H. 8. and so before entailed Lands, were made forfeitable for Treason; and where by the general Words of Lands, Tenements and Hereditaments, 'twas adjudged entailed Lands did not pass, do not concern this Case; but now since they are made forfeitable by that Statute, such general Words are sufficient to serve the Turn.

By the Statute of 16 R. 2. cap. 5. entailed Lands are not forfeited in a Præmunire, but during the Life of Tenant in Tail; because they were not then to be forfeited for Treason, Co. Lit. 130.

2 Inst. 334.
1 Inst. 3.

If then it appears that the Crime of which Sir John Danvers was guilty, was Treason; and if entailed Lands are forfeited for Treason; then when the Act saith, That he shall forfeit all his Lands, by those general Words his entailed Lands shall be forfeited: And though by the Common Law there can be no Attainder in this Case, the Party being dead; yet by Act of Parliament that may be done, and the Words in this Act amount to an Attainder.

The Intent of it was to forfeit Estates Tail, which may be collected from the general Words; for if a Fee-Simple is forfeited, though not named, why not an Estate Tail? Especially since the Word Hereditaments is very comprehensive, and may take in both those Estates, Spelman's Glossary 227. 2 Roll. Rep. 503.

In

In the very Act of 26 H. 8. cap. 13. Eſtates Tail are not named, for the Words are, Every Offender convict of Treaſon, &c. ſhall forfeit all ſuch Lands, Tenements and Hereditaments which he ſhall have of any Eſtate of Inheritance, in Uſe, Poſſeſſion, or by any Right, Title or Means, &c. and yet a Conſtruction hath been made thereupon in Favour of the Crown; ſo a Dignity of an Earldom intailed is forfeitable by this Statute by the Word Hereditament, 7 Co. 34.

Afterwards in Hillary-Term, Rainsford, Chief Juſtice, delivered the Opinion of the Court, That upon Conſtruction of the Act of Pains and Penalties, this Eſtate Tail was forfeited to the King. Judgment.

He agreed, the Series and Progreſs of Eſtates Tail to have been as argued by the Solicitor; and that the Queſtion now was, Whether by the Act of Pains, &c. Eſtates Tail can be forfeited, unleſs there are expreſs Words to take away the Force of the Statute de Donis Conditionalibus, for by that Statute there was a ſettled Perpetuity; Tenant in Tail could neither forfeit nor alien his Eſtate, no not in Caſe of Treaſon, and Forfeiture is a kind of Alienation; but afterwards by the Reſolution in Ed. 4. an Alienation by a Common Recovery was conſtrued to be out of the ſaid Statute: And by the Statute of Fines, 4 H. 7. which is expounded by a ſubſequent Statute of 32 H. 8. cap. 36. Tenant in Tail, notwithſtanding his former Reſtraint, had Power to alien the Eſtate Tail, and bar his Iſſue; but all this while his Eſtate was not to be forfeited for Treaſon, 'till the Statute of 33 H. 8. cap. 20. which gives Uſes, Rights, Entries, Conditions, as well as Poſſeſſions, Reverſions, Remainders, and all other Things of a Perſon attainted of Treaſon by the Common or Statute Law of the Realm, to the King, as if ſuch Attainder had been by Act of Parliament. Preface to 3 Co.

Then by the Statute of 5 & 6 Ed. cap. 11. 'tis enacted, That an Offender being guilty of High Treaſon, and lawfully convict, ſhall forfeit to the King all ſuch Lands, Tenements and Hereditaments which he ſhall have of any Eſtate of Inheritance in his own Right in Uſe or Poſſeſſion; by which Statutes, that de Donis Conditionalibus was taken off in Caſes of Treaſon, as it had been before by the Reſolution in 12 E. 4. and by the Statute of Fines, as to the Alienation of an Eſtate Tail by Fine and Recovery.

If therefore this Act of Pains, &c. will admit of ſuch a Conſtruction as to make Eſtates Tail forfeit; here is a Crime great enough

enough to deserve such a great Punishment; a Crime for which the Parliament hath ordered an Anniversary to be kept for ever with Fasting and Humiliation, to implore that the Guilt of that innocent Blood then shed may not be required of our Posterity; this they esteemed as another kind of Original Sin, which unless thus expiated, might extend not only ad Natos, sed qui nascantur ab illis.

And that this Act will admit of such a Construction, these Reasons were given:

1. From the general comprehensive Words mentioning those Things which are to be forfeited, viz. Messuages, Lands, Tenements, Reversions and Interests, which last Word signifies the Estate in the Land as well as the Land it self, or otherwise the Word must be construed to have no Effect.

2. Estates Tail are not now protected by the Clause in the Statute de Donis * Non habet Potestatem alienandi, but are subject to the Forfeiture by the Act of H. 8. which though it extends to Attainders only, yet 'tis a good Rule for the Judges to make a Construction of an Act of Parliament by, especailly in such a Case as this, wherein 'tis plain that the Law did look upon these Offenders, if not attainted, yet in pari gradu with such Persons, and therefore may be a good Warrant to make the like Construction as in Cases of Attainder.

* Inst. 334.

3. Because the Offenders are dead; for had they been living, there might have been better Reason to have construed this Act not to extend to Estates Tail, because then something might be forfeited, viz. an Estate for Life; and therefore the Act would signifie very little, if such Construction could not be made of it to reach Estates Tail of such Persons who were dead at the Time of the making the Law, especially since 'tis well known, that when Men engage in such Crimes they give what Protection they can to their Estates, and place them as far as they can out of Danger.

4. It appears by the Act, that the Law-makers did not intend that the Children of such Offenders should have any Benefit of their Estates, because in the Proviso there is a saving of all Estates of Purchasers for Money bona Fide paid, and therein also a particular Exception of the Wife and Children and Heirs of the Offenders; and if the Act would not protect the Estate of the Children, though they should be Purchasers for a valuable Consideration, it will never protect their Estate under a voluntary Conveyance made by the Ancestor, especially in this Case, because the Entail carries a Suspicion with it, that it was designed with a prospect to commit this Crime; for Sir John Danvers was Tenant

nant in Tail before; and in the Year 1647, levies a Fine to bar that Entail, and then limits a new Estate Tail to himself, in which there is a Provision to make Leases for any Number of Years upon what Lives soever in Possession or Reversion, with Rent or without it, and this was but the Year before the Crime committed.

5. The Proviso in the Act for saving the Estates of Purchasors doth protect all Conveyances and Assurances, &c. of Land, not being the Lands of the late King, Queen, Prince, *&c.* and not being Land sold for any pretended Delinquency since the First of *June*, 1641, and all Statutes and Judgments suffered by the Offenders from being impeached; from which it appears, that the Parliament looked upon entailed Lands as forfeited; for if Estates made to others upon a valuable Consideration had need of a Proviso to save them from Forfeiture, à fortiori, the Estates out of which those are derived have need of such a Saving, and therefore must be forfeit by the Act; for which Reason these Lands are forfeited.

As to the great Objection which hath been made and insisted on the other Side, and which is Trudgeon's Case, 22 Eliz. 1 Inst. 130. Where Tenant in Tail was attainted in a Præmunire, and it was adjudged that he should forfeit his Land but during his Life; for though the Statute of 16 R. 2. cap. 5. enacts, That in such Case their Lands, Tenements, Goods and Chattels shall be forfeited to the King; yet that must be understood of such an Estate as he may lawfully forfeit, and that is during his own Life, and therefore being general Words, they do not take away the Force of the Statute de Donis, so that his Lands in Fee-Simple, for Life, &c. shall be forfeited, but the Land entailed shall not, during his Life.

But the Answer is plain: For in the Reign of R. 2. when the Statute of Præmunire was made, Estates Tail were under a Perpetuity by the said Statute de Donis, which Statute is now much weakened in the Point of Alienation; and the Law is quite altered since that Time; and 'tis apparent by multitude of Precedents, that such strict Constructions have not been made since that Time to preserve Estates Tail from Forfeitures without special and particular Words; and therefore in the Case of Adams and Lambert, which is a Case in Point, the Judges there construed Estates Tail to be forfeit for want of special Words in the Statute of 1 E. 6. cap. 14. to save it; and that was only a Law made for suppressing of Superstitious Uses upon a politick Consideration; but this is a much greater Offence intended to be punished by this Act, in which there are Demonstrations both from the 4 Co. 164.

the Words and Intent of the Law-makers to make this Eſtate forfeited to the Crown, than in that Caſe ſo much relied on: And Judgment was given accordingly.

Wyld died before Judgment was given; but Juſtice Twiſden ſaid he was of that Opinion, and Jones Juſtice concurred.

Baſſet *verſus* Salter.

After an Eſcape the Plaintiff may have a *Ca' Sa'* or *Sci' Fa'* againſt the Sheriff. 1 Ven. 4. 269. T. Jones 21, 22.

IN an Action for an Eſcape; the Queſtion was, Whether the Plaintiff may take out a Ca' Sa', or have a Fi' Fa' againſt the Defendant after the Sheriff or Gaoler voluntarily ſuffer him to eſcape; but the Court would not ſuffer it to be argued, becauſe it had been lately ſettled that it was at the Election of the Plaintiff to do either; and upon a Writ of Error brought in the Exchequer-Chamber, the Judges there were of the ſame Opinion: But in the Lord Chief Juſtice Vaughan's Time the Court of Common-Pleas were divided, but 'tis ſince ſettled, 1 Roll Abridg. 901, 902.

* If it had been by the Conſent of the Sheriff, he could never take him again, but the Plaintiff might. Sid. 330.

If there be an Eſcape by the Plaintiff's Conſent, though he did not intend it, the Law is hard that the Debt ſhould be thereby diſcharged; as where one was in Execution in the King's-Bench, and ſome Propoſals were made to the Plaintiff in Behalf of the Priſoner, who ſeeing there was ſome Likelihood of an Accommodation, conſented to a Meeting in London, and deſired the Priſoner might be there, who came accordingly; and this was held to be an Eſcape with the * Conſent of the Plaintiff, and he could never after be in Execution at his Suit for the ſame Matter.

Peck *verſus* Hill.

In Communi Banco.

Bond good given in Diſcharge of another. Mod. Rep. 221.

DEBT upon a Bond brought againſt the Defendant as Adminiſtrator, who pleads, That he gave another Bond in his own Name in Diſcharge of the firſt Bond; and upon Iſſue joined, it was found for the Defendant; and it was moved that Judgment might not be entred hereupon, becauſe it was a bad Plea.

But

But North Chief Justice, and Wyndham and Scroggs, Justices, were of Opinion, That it was a good Plea, because there was other Security given than what the Plaintiff had before; for upon the first Bond he was only liable de Bonis Intestatoris, but now he might be charged in his own Right, which may be well said to be in full Satisfaction of the first Obligation; for where the Condition is for Payment of Money to the Party himself, there if he accept any collateral Thing in Satisfaction, 'tis good. Co. Lit. 122. b.

If a Security be given by a Stranger, it may discharge a former Bond, and this in Effect is given by such: And 'tis not like the Case in Hobart, where a Bond was given by the same Party upon that very Day a former Bond was payable, and adjudged not a good Discharge, for the Obligee was in no better Condition than he was before.

Justice Atkins doubted, but inclined, That one Bond cannot be discharged by giving another, though the Discharge be applied to the Condition of the Bond; and for this, he cited Cro. Eliz. 716, 727. which was a Case adjudged so in Point; and therefore this Plea upon Demurrer should have been over-ruled; yet since Issue was taken upon it, and a Verdict for the Defendant, the Plea is helped by the Statute of Jeofails, 32 H. 8. here being a direct Affirmative and Negative. Cro. Car. 85.

But as to that, the Chief Justice and Scroggs Justice replied, That an immaterial Issue no ways arising from the Matter, is not helped; as an Action of Debt upon a Bond laid to be made in London, and the Defendant saith that it was made in Middlesex, and this is tried, 'tis not aided by the Statute, but there must be a Repleader.

But because it was sworn, That the Obligor (who was the Intestate) was alive Four Years after the Time that the Second Bond was given, and for that Reason it could not be given upon the Account of the Defendant's being liable as Administrator, but must be intended a Bond to secure a Debt of his own, therefore a new Trial was granted.

Cook *and others verſus* Herle.

Covenant will lie in the Perſonalty, tho' the Grant be executed by the Statute of Uſes, which makes a Diſtreſs the proper Remedy. Mod. Rep. 223.

IN Covenant, the Caſe was this: Charles Cook made a Jointure to Mary his Wife for Life, and died without Iſſue; the Land deſcended to Thomas Cook his Brother and Heir, who grants an Annuity or Rent-Charge of 200 l. per Annum to the Plaintiffs in Truſt for Mary, and this was to be in Diſcharge of the ſaid Jointure, *Habendum* to them, their Heirs, Executors, Adminiſtrators and Aſſigns in Truſt for the ſaid *Mary* for Life, with a Clauſe of Diſtreſs, and a Covenant to pay the 200 l. per Annum to the ſaid Truſtees for the Uſe of the ſaid Mary; the Breach aſſigned was, that the Defendant had not paid the Rent to them for the Uſe of *Mary*.

The Defendant demurred ſpecially, for that it appears by the Plaintiff's own ſhewing that here is a Grant of a Rent-Charge for Life, which is executed by the Statute of Uſes, and therefore there ought to have been a Diſtreſs for Non-payment, which is the proper Remedy given by the Statute, and this Action will not lie in the Perſonalty.

2. 'Tis ſaid, The Defendant did not pay it to the Plaintiffs for the Uſe of Mary, which is a Negative Pregnant, and implies that it was paid to them.

3. 'Tis not averred, that the Money was not paid to Mary; and if 'tis paid to her, then the Breach is not well aſſigned.

Ex parte Quer.

But Serjeant Baldwin for the Plaintiff replied, That it was not a Queſtion in this Caſe, whether the Rent-Charge was executed by the Statute or not, for quacunq; via data an Action of Covenant will lie; and that the Breach was aſſigned according to the Words of the Covenant, and ſo prima facie 'tis well enough; for if the Defendant did pay the Money to the Plaintiffs he may plead it, and ſo he may likewiſe if he paid it to Mary.

Curia.

The Court were all of Opinion, That this Rent-Charge was executed by the Statute of Uſes by the expreſs Words thereof, which executes ſuch Rents granted for Life upon Truſt, as this Caſe is, and transfers all Rights and Remedies incident thereunto, together with the Poſſeſſion to *Ceſtuy que uſe*; ſo that though the Power of Diſtraining be limited to the Truſtees by this Deed, yet by the Statute which transfers that Power to Mary, ſhe may diſtrain alſo; but this Covenant being Collateral, cannot be transferred.

5 Co. 18. a.

The

The Clauſe of Diſtreſs, by the expreſs Words of the Act, is given to the Ceſtuy que Uſe; but here is a double Remedy, by Diſtreſs or Action; for if the Leſſee aſſign his Intereſt, and the Rent is accepted of the Aſſignee, yet the Covenant lies againſt the Leſſee for Non-payment upon the expreſs Covenant to * pay; ſo if a Rent be granted to S. and a covenant to pay it to N. for his Uſe, 'tis a good Covenant.

* Hayes *and* Bickerſtaff. Hollis *and* Carr, Antea.

And it was agreed, That the Aſſignment of a Breach according to the Words of the Covenant is good enough, and that if any Thing be done which amounts to a Performance, the other Side muſt plead it; as in this Caſe, the Defendant might have pleaded that the Money was paid to Mary, which is a Performance in Subſtance, but it ſhall not be intended without pleading of it: Whereupon Judgment was given for the Plaintiff.

Read *verſus* Dawſon.

Repleader after an immaterial Iſſue.

DEbt upon Bond againſt the Defendant as Executor: Iſſue was joined, whether the Defendant had Aſſets or not on the Thirtieth Day of November, which was the Day on which he had the firſt Notice of the Plaintiff's original Writ, and it was found for the Defendant, that then he had not Aſſets.

It was moved for a Repleader, (becauſe it was ſaid) this was an immaterial Iſſue, for though he had not Aſſets then, yet if he had any afterwards, he is liable to the Plaintiff's Action.

But Barrel, Serjeant, moved for Judgment upon this Verdict, by Reaſon of the Statute of 32 H. 8. which helps in Caſes of Miſpleading or inſufficient Pleading. 'Tis true, there are many Caſes which after Verdict are not aided by this Statute, as if there are Two Affirmatives, which cannot make an Iſſue, or when after a Traverſe Iſſue is joined with an hoc petit quod inquiratur per Patriam; this is no Iſſue, 2 Anderſ. 6, & 7. So if there be no Plea at all, as if an Action is brought againſt Baron and Feme, and ſhe pleads only, 2 Cro. 288. So if the Party puts himſelf ſuper Patriam, where it ſhould be tried by Record, or if the Plea be nothing to the Purpoſe, or lie not in the Mouth of the Parties, ſuch immaterial Iſſues as theſe cannot be good. Yelv. 210. Hob. 126.

The Difference in Moor 867. is, If the Plea, on which the Iſſue is joined, hath no colourable Pretence in it to bar the Plaintiff, or if it be againſt an expreſs Rule in the Law, there the Iſſue is immaterial, and ſo as if there was no Iſſue; and therefore 'tis

not aided by the Statute; but if it hath the Countenance of a legal Plea, though it want neceſſary Matter to make it ſufficient, there ſhall be no Repleader, becauſe 'tis helped after Verdict.

Here the Parties only doubt, whether there were Aſſets at the Time of the Notice? And 'tis found there were none, and ſo Judgment was to be given accordingly; and of that Opinion was the whole Court.

But Juſtice Atkins was clear of Opinion, That if the Parties join in an immaterial Iſſue, there ſhall be no Repleader, becauſe 'tis helped after Verdict by theſe Words in the Statute, viz. [any Iſſue;] 'Tis not ſaid an Iſſue joined upon a material Point; and the Intent of the Statute was to prevent Repleaders; and that if any other Conſtruction ſhould be made of that Act, he was of Opinion, That the Judges ſate there not to expound, but make a Law; for by ſuch an Interpretation much of the Benefit intended by the Act to the Party, who had a Verdict, would be reſtrained.

Curia. The other Juſtices were all of Opinion, That ſince the making of this Statute it had been always allowed, and taken as a Difference, That when the Iſſue was perfectly material there ſhould be no Repleader; but that it was otherwiſe where the Iſſue was not material.

And Juſtice Scroggs asked merrily, If Debt be brought upon a Bond, and the Defendant pleads Robin Hood dwelt in a Wood, and the Plaintiff joins Iſſue that he did not, this is an immaterial Iſſue; And ſhall there not be a Repleader in ſuch Caſe after Verdict? Ad quod non fuit Reſponſum.

Beaumont *verſus* .....

Wager of Law. 2 Vent. 171.

THE Plaintiff brings an Action of Debt upon a Judgment obtained againſt the Defendant in a Court Baron, having declared there in an Action on the Caſe upon an Aſſumpſit, and recovered.

Sid. 366. The Defendant came to wage his Law, and was ready to ſwear that he owed the Plaintiff nothing; but the Court held that he was not well adviſed, for by the Recovery in the Inferior Court it became now a Debt, and was owing; and being asked, whether he had paid the Money; he anſwered, that he owed nothing: Whereupon the Court concluded that he had not paid it, and therefore they would not admit him to wage his Law without bringing ſufficient

cient Compurgators to swear that they believed he swore Truth; but such not appearing, the Defendant defecit de Lege, and Judgment had been given against him, but he offered to bring the Money recovered and the Costs into the Court, and to go to a new Trial, it being a very hard Case upon him at the former Trial, where the Demand was of a Quit-Rent of 18 d. per Annum; the Defendant promised, that if the Plaintiff would shew his Title, and satisfy him that he had a Right to demand it, he would pay him the Rent; and at the Trial, express Oath was made of a Promise to pay, upon which the Verdict was obtained; whereas it was then urged that the Freehold would come in Question upon that Promise, and so the Inferior Court could have no Jurisdiction.

And afterwards the Chief Justice said, That it hath been adjudged in the King's Bench, that an Inferior Court cannot hold Plea on a quantum meruit for Work done out of the Jurisdiction, though the Promise be made within; and that he knew where a Person of Quality intending a Marriage with a Lady, presented her with a Jewel, and the Marriage not taking Effect, he brought an Action of Detinue against her, and she taking it to be a Gift, offered to wage her Law; but the Court was of Opinion, That the Property was not changed by this Gift, being to a specifical Intent, and therefore would not admit her to do it. Quod nota.

Styleman *versus* Patrick.

AN Action on the Case was brought by the Plaintiff against the Defendant, for eating of his Grass with his Sheep, so that he could not in tam amplo modo enjoy his Common; there was a Verdict for the Plaintiff, and it was now moved, that he should have no more Costs than Damages, because this was a Trespass in its own Nature, and the Judge of Assize had not certified that the Title of any Land was in Question. Costs allowed.

But the Court were all of Opinion, that this Case was not within the Statute. Curia.

For it was not a frivolous Action, because a little Damage done to one Commoner, and so to Twenty, may in the whole make it a great Wrong; if the Cause were frivolous, the Judge of Assize may mark it to be such by Vertue of the Statute of 43 Eliz. cap. 6. and then there shall be no more Costs than Damages; and though in this Case the Plaintiff hath in his Declaration set out a Title to his Common, yet the Title of the Land

Land cannot possibly come in Question, and therefore not to be certified as in Cases of Trespass; neither is there any Need of a Certificate, if it appears by the Pleading that the Title of the Land is in Question.

The Court being against the Defendant as to the Costs; his Council then moved in Arrest of Judgment, because the Plaintiff sets forth his Right to the Common only by Way of Recital with a cumque etiam, &c. that he had a Right to Common in such a Place, sed non allocatur; for 'tis Affirmative enough, and afterwards he is charged with doing the Plaintiff Damage; and so the Case is not like to an Action of Trepass quare cum he did a Trespass, for there the Sense is imperfect.

Postea.

DE

DE
Term. Sancti Hill.

Anno 28 & 29 Car. II. in Communi Banco.

James *verſus* Johnſon.

IN Treſpaſs, the Defendant juſtified by a Preſcription to have Toll, and Iſſue being joined thereupon, the Jury found a Special Verdict, in which the Caſe upon the Pleadings was, viz. Before the Diſſolutions of Priories, the Manor now in the Poſſeſſion of the Defendant was Parcel of the Priory of B. which came to the Crown by the ſaid Diſſolution; and the King made a Grant thereof to Sir Jervas Cliſton in Fee, together with the ſaid Toll adeo plene, as the Prior had it; and the Defendant having brought down a Title by ſeveral Meſne Aſſignments, claims by Vertue of a Leaſe from Sir Jervas for Seven Years then in being, alledging, That the ſaid Sir Jervas, and all thoſe whoſe Eſtate he had might take Toll; and whether this Pleading by a Que Eſtate to have Right of Toll was good in Law, the Jury doubted.

Que Eſtate, where 'tis pleadable. Mod. Rep. 231.

Baldwin, Serjeant, for the Plaintiff, argued, That the Juſtification was not good, becauſe there are Two Sorts of Toll, viz. Toll through, and Toll traverſe; one is in the King's High-Way, and the other in a Man's own Soil; and it doth not appear for which the Defendant hath juſtified. If it be for the firſt, then he ought to ſhew that he did make a Cauſeway, or ſome other Thing that might be an Advantage to the Paſſengers, to entitle himſelf to a Preſcription; but if it be for the other, then he muſt alſo ſhew it was for paſſing upon his Soil, which implies a Conſideration, 22 Aſſize, Kelw. 148. Pl. Com. 236. Lord Berkley's Caſe. 1 Cro. 710. Smith *verſus* Sheppard; by which Caſes it appears that the Juſtification ought to be certain.

Ex parte Quer.

Then

Then as to the Point in Question, he said, That Toll cannot be Appurtenant to a Manor, and so the Pleading by a Que Estate is not good; but if that should be admitted, yet the Manor being vested in the Crown by the Dissolution, the Toll then became in Gross, and could never after be united to the Manor, or Appurtenant thereunto.

But it was argued for the Defendant by Maynard, Serjeant, and the whole Court were clear of Opinion, That the Issue was upon a particular Point, and the Title was admitted, and that nothing remained in Question but the Point in Pleading. And as to what had been objected, That Toll cannot belong to a Manor, 'tis quite otherwise; for an Advowson, a Rent, a Toll, or any Profit Apprender may be Appurtenant to it. 'Tis true, a Man cannot prescribe by a Que Estate of a Rent, Advowson, Toll, &c. but he may of a Manor, to which these are Appendant; 'tis likewise true, that if the Defendant had said this was Toll for passing the Highway, he must shew some Cause to entitle himself to the taking of it, as by doing something of Publick Advantage.

But this general Way of Pleading is the most usual, and so are the Precedents, and it ought to come on the other Side, and to be alledged, That the Defendant prescribed for Toll in the High-way; and in this Case, though the Manor came to the Crown, the Toll remained Appurtenant still, and so it continued when it was granted out. The Difference is between a Thing which was originally a Flower of the Crown, and other Things which are not, as Catalla Felonum, &c. if such come again to the King, they are merged in the Crown; but 'tis otherwise in Cases of a Leet, Park, Warren, Toll, &c. which were first created by the King, 9 Co. Abbot de Strata Marcella's Case. So that this Toll is not become in Gross by the Dissolution, whereupon Judgment was given for the Defendant.

Sir William Turner's *Case.*

Amendment not after Issue joined.

DEbt qui tam, &c. for 100 l. against Sir William Turner, being a Justice of Peace in London, for denying his Warrant to suppress a Seditious Conventicle of one Mr. Turner in New-street. This Cause was to be tried by Nisi prius this Term, before the Chief Justice. And now the Plaintiff moved to amend one Word in the Declaration, wherein he was mistaken, for he had laid the Meeting to be at Turner's Mansion-

sion-House, and upon Enquiry, he understood the Place of Meeting was not at his Mansion-House, but at a little Distance from it, and so prayed the Word Mansion might be struck out.

But the Chief Justice said, That after Issue joined, and the Cause set down to be tried, and this being a penal Statute, no Precedent could be shewn of an Amendment in such Case, and therefore would not make this the first, and so Leave was given to the Plaintiff to discontinue upon Payment of Costs. Curia

Brown *versus* Johnson.

IN Accompt: The Plaintiff declares against the Defendant, for that upon the First of March, 22 Car. 2. & abinde to the First of May, 27 Car. 2. he was his Bailiff, and Receiver of 80 Pigs of Lead.

Time where 'tis made Parcel of the Issue, not good.

The Defendant pleads, That from the said First Day of March, 22 Car. 2. to the First Day of May, 27 Car. 2. he was not the Plaintiff's Bailiff, or Receiver of the said 80 Pigs of Lead, & hoc paratus est verificare. To this the Plaintiff demurred, and assigned specially for Cause, that the Times from the First of March to the First of May are made Parcel of the Issue, which ought not to be, because the Plaintiff in his Declaration must alledge a Time for Form-sake; but the Defendant ought not to tie him up to such Time alledged, for he might have said he was not Bailiff modo & forma.

And for this the Case of Lane and Alexander was cited, where the Defendant in Ejectment makes a Title by Copy of Court-Roll, granted to him 44 Eliz. and the Plaintiff replies his Title by the like Grant, 1 Junii, 43 Eliz. The Defendant maintains his Bar, and traverseth that the Queen, 1 Junii, in the 43d Year of her Reign, granted the said Land by Copy, and upon Demurrer it was adjudged, That the traversing of the Day is Matter of Substance, which being made Part of the Issue, is naught.

But on the other Side it was objected, That Time is material, and that in Actions of Accompt 'tis proper to make it Parcel of the Issue; for a Man may be Bailiff for Two, but not for Three Years, and a Release may be pleaded from such a Time to such a Time, Fitz. Accompt 30. Rast. Entry f. 8. 19 pl. 1. f. 20. pl. 6. f. 22. pl. 2.

1. Then Exceptions were taken to the Plea, first, for that the Plaintiff having charged the Defendant as Receiver of 80 Pigs of Lead; the Defendant pleads, and that he was not Receiver thereof, but doth not say of any Part thereof; for which Reason the Court held the Plea ill, because he might retain 79, and yet not 80 Pigs, but to plead generally ne unques Receptor is well enough; though it was urged, That if it had been found against him upon such an Issue that he had received any Parcel of the Lead, he should have accompted, 24 H. 4. 21. 2 Roll. 3. 14. 32 H. 6. 33. Fitz. Accompt 16. Cro. Eliz. 850. Fitz. Accompt 14. Rast. Entry 18, 19, 20.

2. The Defendant concludes & hoc paratus est verificare, whereas it should be & de hoc ponit se super patriam; but the Court doubted of this, because it was not specially assigned.

Postea. 3. The Plaintiff charged the Defendant as his Bailiff upon the First of March, and the Defendant pleads, That he was not his Bailiff from the First of March, so he excludes that Day; and this the Court held to be incurable, and likewise that the Time ought not to be made Parcel of the Issue, and so Judgment was given quod computet.

2 Sand. 317, 318.

Abraham *versus* Cunningham.

Administrator sells a Term, afterwards an Executor appears and renounces, yet the Sale was adjudged void.

1 Ven. 303. T. Jones 72. 2 Levinz 182.

6 Co. Packman's Case.

IN a Special Verdict in Ejectment, the Case upon the Pleadings was, Viz. Sir David Cunningham being possessed of a Term for Years, made his Will, and therein appointed his Son Sir David Cunningham to be his Executor, and died. Sir David the Executor, in the Year 1663. made his Will also, and therein appointed David Cunningham his Son, and Two others, to be his Executors, and died; those Two Executors die, and B. a Stranger takes Administration, cum Testamento annexo, and continues this Administration from the Year 1665. to the Year 1671. in which Time he made an Assignment of this Term to the Lessor of the Plaintiff, for which he had received a thousand Pounds: And in the Year 1671. the surviving Executor of Sir David the Executor made Oath in the Archbishop's Court, that he never heard of his Testator's Will 'till then, nor ever saw it before, and that he had not meddled with the Estate, nor renounced the Executorship: Then a Citation goes to shew Cause why the Administration should not be repealed, and Sentence was given that it should be revoked; upon which the Executor enters, and the Lessor of the Plaintiff entred upon him.

This

This Case was argued by Saunders for the Plaintiff, and Levinz for the Defendant. And first it was said in Behalf of the Plaintiff, that the Authorities in the Books were strong on his Side, that the first Administration was well granted: 'Tis true, if a Man make a Will, and Administration is granted, and that Will is afterwards proved, such Administration is void, as in Greysbrook and Foxe's Case, Pl. Com. Ex parte Quer.

But in this Case, after the Death of Sir David Cunningham the Executor, his Testator is dead Intestate; for to make an Executor, there must be first the Naming of him; then there must be some concurring Act of his own to declare his Assent, that he will take Onus Executionis upon him, for no Man can make another Executor against his Will; so that if after the Death of the first Executor, those other Executors appointed by him had made such a Declaration as this surviving Executor hath since done, their Testator had died Intestate, 7 E. 4. 12, 13.

The Executor is made by the Testator, and the Ordinary is empowered by the Statute to make the Administrator where the Person dies Intestate; so that 'tis plain, there cannot be an Executor and Administrator both together: If he who is made so taketh upon him long after the Will to be Executor, it shall make him such by Relation from the Time of the Death of the Testator; but here is no Executor, nor ever was: 'Tis true, that one was named, but as soon as he heard of the Will, he renounced; and therefore there being no Executor in this Case, nothing now can hinder the Administration to be granted cum Testamento annexo.

If the Testator should die indebted, or have Debts owing to him, and the Executor refuses Probate, and renounces his Executorship, Administration must be granted, for Lex fingit ubi subsistit Æquitas, and the Executor having a Possibility to be such, and by his Refusal becoming no Executor, why should the bare naming of him to be an Executor have relation to make such Administration void, since 'tis not the Name, but the Doing of the Office, which makes him Executor? Dyer 372.

If all these Executors had died after Administration thus committed, it cannot be said that they ever were Executors.

There can be no Inconvenience that this Administration should be good; for 'tis just that Creditors should have their Debts, and Purchasors should be secure in the Things purchased.

If the Testator was indebted, an Action will lie against an Executor de son Tort for such Debt, which Executor is altogether as wrongful as the Administrator, to whom Administration is

committed, and the Will afterwards proved by the rightful Executor; and if such Executor of his own Wrong be possessed of a Term for Years, and a Creditor recovers against him, that Executor shall have the Term in Satisfaction of his Debt; and by the same Reason shall the Administrator here have a good Title to this Term, which he sold for the Payment of a just Debt, and there is no Authority for making such Administration void, unless it be where the Executor proves the Will, but never when he renounceth.

Ex parte Def.

But on the other Side it was said, That an Executor of an Executor hath all the Interest which the first Executor had; so that being an Executor, the Administration granted by the Ordinary is void, and the Renunciation afterwards shall never make it good; and this will appear by the different Interests which the Ordinary and the Executor have by Law.

1. The Ordinary originally had nothing to do with the Estate of the Intestate, for * bona Intestati capi solent in manus Regis. Afterwards Two Statutes were made, which establish his Power; the first was West. 1. cap. 19. and the other was 31 E. 3. c. 11. Yet no Power was thereby given him to dispose of the Goods to his own Use, or to the Use of any other; he had only a Property secundum quid, and not an absolute and uncontroulable Right in the Estate.

* Godolph. 59.

2. But the Executor hath a Right and Interest given to him by Law when the Will is made, and may * Release before Probate; if he therefore hath an absolute Right, and the Ordinary hath only a qualified Property, how can he grant the Administration of the Goods, which at the same Time are lawfully vested in another? Suppose the Executor sells such Goods to one Man, and the Administrator to another, the Sale of one of them must be void; and for the said Reasons, and by the constant Course of the Law, it must be the latter.

* 5 Co. Middletons Case

2 Anders. 150. Case 83.

It hath been objected, That here was no Executor at all, only one named; or if it be admitted that there was an Executor, yet his Refusal shall relate to the Time of the Administration committed, and make that good which might not be so before.

But as to that, he said, That here was an Executor appointed by the Will, who had an Interest, and Administration being granted to another, 'tis void ab initio, and what is once void, cannot be made good by any Subsequent Act, 10 Co. 62. a.

Mod. Rep. 214.

Here

Here was a want of Power in him who did this Act; for the Ordinary could not grant Administration where there is an Executor, and therefore no Relation shall be to make that good which was once void; but if it had been only voidable, it might have been otherwise.

A Relation may be to inable the Party to recover the Goods of the Intestate, and to punish Trespasses; as if a Man die possessed of Goods, and a Stranger convert them, and afterwards Administration is granted to S. this Administration shall * relate to the Time of the Death of the Intestate, so that he may maintain Trover before the Ordinary had committed it to him, but it will never aid the Acts of the Parties to avoid them by Relation; as if a Man makes a Feoffment to a Feme Covert, and afterwards devises the same Land, the Husband disagrees, this shall have Relation between the Parties, so as the Husband shall not be charged in Damages, but it shall not make the void Devise good, 3 Co. 28. b. Butler *and* Baker's Case. * 2 Roll. Abr. 399.

So if a Man makes a Release, and afterwards get Letters of Administration, that shall not relate to make his Release good to bar him, neither shall his Refusal of the Executorship do it, because at the Time of the Release, or the Refusal, there was not any Right of Action in him; for that commences in the one Case after Administration, and in the other after the Probate of the Will.

Notwithstanding such Refusal, this Executor may afterwards administer at his Pleasure, and intermeddle with the Goods of the Testator, and if the Administration should be good also, then they would have a Power over the same Estate by Two Titles at the same time, which cannot be. Godolph. 141.

The greatest Argument which can be brought against this is ab Inconvenienti, because it cannot be safe to purchase under an Administrator, since a Will may be concealed for a Time, and afterwards the lawful Executor therein appointed may appear; but this is more proper for the Wisdom of a Parliament to redress, than that the Law should be altered by a Judicial Determination of the Court, and therefore he prayed Judgment for the Defendant.

The Court was of Opinion, That the Ordinary cannot grant Administration where there is an Executor named in the Will, and therefore gave Judgment for the Defendant against the Clendee of this Term. Judgment

The

The Lord Townſend *verſus Dr.* Hughes. *In C. B.*

No new Trial in an Action of *Scandalum Magnatum*. Mod. Rep. 232.

The Plaintiff brought an Action of Scandalum Magnatum for theſe Words ſpoken of him by the Defendant, viz. He is an unworthy Man, and acts againſt Law and Reaſon: Upon Not-Guilty pleaded, the Caſe was tried, and the Jury gave the Plaintiff 4000 l. Damages.

The Defendant before the Trial made all poſſible Submiſſion to my Lord; he denied the ſpeaking the Words, and made Oath that he never ſpoke the ſame; after the Trial he likewiſe addreſſed to my Lord as before, making ſeveral Proteſtations of his Innocency: But having once in a Paſſion ſaid, that he ſcorned to ſubmit; my Lord for that Reaſon would not remit the Damages. It was therefore moved for a new Trial, upon theſe Reaſons:

1. Becauſe the Witneſſes, who proved the Words, were not Perſons of Credit; and that at the Time when they were alledged to be ſpoken, many Clergy-Men were in Company with the Defendant, and heard no ſuch Words ſpoken.

2. It was ſworn, That one of the Jury confeſſed, that they gave ſuch great Damages to the Plaintiff (not that he was damnified ſo much, but) that he might have the greater Opportunity to ſhew himſelf Noble in the remitting of them.

3. And which was the principal Reaſon, becauſe the Damages were Exceſſive.

Curia.

The Court delivered their Opinion ſeriatim: And Firſt,

The Chief Juſtice North ſaid, In Caſes of Fines for Criminal Matters, a Man is to be fined by Magna Charta with a Salvo Contenemento ſuo, and no Fine is to be impoſed greater than he is able to pay; but in Civil Actions, the Plaintiff is to recover by Way of Compenſation for the Damages he hath ſuſtained, and the Jury are the proper Judges thereof.

This is a Civil Action brought by the Plaintiff for Words ſpoken of him, which if they are in their own Nature actionable, the Jury ought to conſider the Damage which the Party may ſuſtain; but if a particular Averment of ſpecial Damages makes them actionable, then the Jury are only to conſider ſuch Damages as are already ſuſtained, and not ſuch as may happen in Futuro, becauſe for ſuch the Plaintiff may have a new Action: He ſaid, that as a Judge he could not tell what Value to ſet upon the Honour

nour of the Plaintiff, the Jury have given 4000 l. and therefore he could neither lessen the Sum, or grant a new Trial, especially since by the Law the Jury are Judges of the Damages; and it would be very inconvenient to examine upon what account they gave their Verdict; they having found the Defendant guilty did believe the Witnesses, and he could not now make a Doubt of their Credibility.

Wyndham, Justice, accorded in omnibus.

Atkins, Justice, contra. That a new Trial should be granted, for 'tis every Day's Practice, and he remembred the Case of Goulston *and* Wood in the King's Bench, where the Plaintiff in an Action on the Case for Words for calling of him Bankrupt recovered 1500 l and that Court granted a new Trial, because the Damages were excessive.

The Jury in this Case ought to have respect only to the Damage which the Plaintiff sustained, and not to do an unaccountable Thing, that he might have an Opportunity to shew himself Generous; and as the Court ought with one Eye to look upon the Verdict, so with the other they ought to take notice what is contained in the Declaration, and then to consider whether the Words and Damages bear any Proportion; if not, then the Court ought to lay their Hands upon the Verdict: 'Tis true, they cannot lessen the Damages; but if they are too great, the Court may grant a new Trial.

Scroggs, Justice, accorded with North and Wyndham, that no new Trial can be granted in this Cause: He said, That he was of Council with the Plaintiff before he was called to the Bench, and might therefore be supposed to give Judgment in Favour of his former Client, being prepossess'd in the Cause, or else (to shew himself more signally just) might without considering the Matter give Judgment against him; but that now he had forgot all former Relation thereunto, and therefore delivered his Opinion, That if he had been of the Jury, he should not have given such a Verdict; and if he had been Plaintiff, he would not take Advantage of it, but would overcome with Forgiveness such Follies and Indiscretions of which the Defendant had been guilty; but that he did not sit there to give Advice, but to do Justice to the People. He did agree, That where an unequal Trial was, (as such must be where there is any Practice with the Jury) in such Case 'tis good Reason to grant a new Trial; but no such Thing appearing to him in this Case, a new Trial could not be granted.

Suppose

Suppoſe the Jury had given a ſcandalous Verdict for the Plaintiff, as a Penny Damages, he could not have obtained a new Trial in Hopes to increaſe them, neither ſhall the Defendant in Hopes to leſſen them; and therefore by the Opinion of theſe Three Juſtices, a new Trial was not granted.

Afterwards in this Term, Serjeant Maynard moved in Arreſt of Judgment, and ſaid, That this Action was grounded upon the Statute of R. 2. which conſiſts of a Preamble, reciting the Miſchief, and of the enacting Part in giving of a Remedy, and that the Defendant's Caſe was neither within the Miſchief, or the Remedy.

This Statute doth not create any Action by Way of particular Deſign, and if the Matter was now Res integra, much might be ſaid that an Action for Damages will not lie upon this Statute; for the Statute of Weſtm. 2. appoints, That the Offender ſhall ſuffer Impriſonment, until he produces the Author of a falſe Report; and the Statute of 2 R. 2. which recites that of Weſt. 2. Ca. 33. gives the ſame Puniſhment, and the Action is brought qui tam, &c. and yet the Plaintiff only recovers for himſelf: It was uſual to puniſh Offenders in this Kind in the Star-Chamber; as in the *12 Co. 132. * Earl of Northampton's Caſe, where one Goodrick ſaid of him, That he wrote a Book againſt *Garnet*, and a Letter to *Bellarmine*; intimating, That what he wrote in the Book was not his Opinion, but only ad captandum Populum, which was a great Diſgrace to him in thoſe Days, being as much as to ſay, he was a Papiſt, Cro. Eliz.

But the Serjeant would not inſiſt upon that now, ſince it hath been ruled that where a Statute prohibits the Doing of a Thing, which, if done, might be Prejudicial to another; in ſuch Caſe he may have an Action upon that very Statute for his Damages.

But the Ground on which he argued was, That theſe Words as ſpoken, are not within the Meaning of the Act, for they are not actionable.

1. Becauſe they are no Scandal, and Words which are actionable muſt import a great Scandal, which no Circumſtance or Occaſion of Speaking can excuſe; and if they are Scandalous, and capable of any Mitigation by the precedent Diſcourſe, the Pleading of that Matter will make them not actionable; and for *4 Co. this, the Lord * Cromwell's Caſe is a plain Authority, the Words ſpoken of him were, You like thoſe that maintain Sedition againſt the King's Perſon; the Occaſion of ſpeaking of which was to give an Account of his favouring the Puritan Preachers, which was all that was intended by the former Diſcourſe; for that Lord had approved a Sermon which was preach-

ed

ed by a Parſon againſt the Common-Prayer-Book, and the Defendant having forbid ſuch Preaching, the Lord told him, That he did not like him, upon which he ſpoke thoſe Words; ſo that the ſubject Matter explained the Senſe, for which Reaſon it was adjudged that the Action would not lie.

2. The Scandal for which an Action may be brought within this Statute muſt be falſe, for that Word goes quite through the whole Act, viz. Falſe News, falſe Lyes, *&c.* and the Words here are ſo general, that it cannot appear whether they are true or falſe, for there can be no Juſtification here; as in caſe where a Man is charged with a particular Crime, my Lord Townſend is not charged with any particular Act of Injuſtice as a Subject, nor with any Miſdemeanour as a Peer, nor with any Offence in an Office.

If therefore in all Actions brought upon this Statute the Defendant may juſtifie and put the Matter in Iſſue to try whether it be true or falſe; and in this Caſe the Defendant can neither juſtifie nor traverſe, for this Reaſon the Action will not lie.

That the Words are general and of a doubtful Signification, it cannot be denied; for to ſay, He is an unworthy Man, imports no particular Crime; Unworthy is a Term of Relation, as he is unworthy of my Friendſhip, Acquaintance or Kindred, and ſo may be applicable to any Thing; and a Lord may in many Things be unworthy of a particular Man's Friendſhip, as if he promiſes to pay a Sum of Money at a Day certain, and faileth in the Payment, (as 'tis often ſeen) ſuch is an unworthy Man, but that will not bear an Action: He is an unworthy Man who invites another to Dinner to affront him; but it will not bear an Action to ſay, That a Lord invited me to Dinner to abuſe me; neither will it be actionable to ſay, He is an unworthy Man; becauſe ſuch Inſtances may be given of his Unworthineſs which will not bear an Action. If my Lord had been compared to any baſe and unworthy Thing, theſe Words might have been actionable; and that was the Caſe of the Lord Marqueſs of Dorcheſter, it being ſaid of him, That there was no more Value in him than in a Dog.

Then to ſay, A Man acts againſt Law, this is no Scandal, becauſe every Man who breaks a Penal Law, and ſuffers the Penalty, is not guilty of any Crime. The Statute commands the Burying in Woollen, the Party buries one of his Family in Linnen; in this he acts againſt the Law, but if the Penalty is ſatisfied, the Law is ſo likewiſe.

A Man who acts againſt Law acts againſt Reaſon, becauſe Lex eſt ſumma Ratio; but no Inſtance is here given wherein he did thus act: 'Tis not ſaid, That he did act againſt Law wilfully, or that

he uſed to do any Thing againſt Law; and ſo cannot be like the Caſe of the Duke of Buckingham, who brought an Action for theſe Words, viz. You are uſed to do Things againſt Law, and put Cattle into a Caſtle where they cannot be replevied; for there was not only an Uſage charged upon him, but a particular Inſtance of Oppreſſion.

This Action lies for Words ſpoken of a Judge of either Bench, and of a Biſhop, as well as of a Peer. Now if a Man ſhould ſay, A Judge acted againſt Law, will an Action lie? Becauſe a Judge may do a Thing againſt Law, and yet very juſtly and honeſtly, unleſs all the Judges were infallible, and could not be ſubject to any Miſtakes, which none will deny.

So if a Biſhop return the Cauſe of his Refuſal to admit a Clerk quia Criminoſus, this is a Return againſt Law, becauſe 'tis not general; but if J. S. ſhould ſay, A Biſhop acted againſt Law, and ſhew that for Cauſe, an Action would not lie. If the Lord Townſend had commanded his Bailiff to make a Diſtreſs without Cauſe, that had been acting againſt Law and Reaſon.

He agreed the Words to be uncivil, but not actionable; for if ſuch Conſtruction ſhould be made, a Man muſt talk in Print, or otherwiſe too ſpeak any Thing of a Peer for fear of an Action.

There are many Authorities where a Peer ſhall not have an Action for every trivial and ſlight Expreſſion ſpoken of him.

As to ſay of a Peer, He keeps none but Rogues and Raſcals about him like himſelf; by the Opinion of Two Juſtices, Yelverton and Flemming, the Action would not lie, becauſe they are Words of Scolding; and this was the Caſe of the Earl of Lincoln, Cro. Jac. 196. But the Court was divided; the Defendant died, and ſo the Writ abated.

Actions for Words have been of late too much extended; formerly there were not above Two or Three brought in many Years; and if this Statute ſhould be much inlarged, the Lords themſelves will be prejudiced thereby by maintaining Actions one againſt another.

Upon this Statute of 2 R. 2. c. 5. there was no Action brought 'till 13 H. 7. which was above an Hundred Years after the making of that Law; and the Occaſion of making the Law was, becauſe the Duke of Lancaſter, who was then the firſt Prince of the Blood, took notice that divers were ſo hardy as to ſpeak of him ſeveral lying Words, 1 R. 2. Num. 56. and therefore this Statute was made to puniſh thoſe who deviſed falſe News, and horrible and falſe Lies of any Peer, &c. whereby Diſcords might ariſe between the Lords and Commons, and great Peril and Miſchief

chief to the Realm and quick Subversion thereof: Now from the natural Intent and Construction of these Words in the Act, can it be supposed that if one should say, Such a Peer is an unworthy Man, that the Kingdom would be presently in a Flame, and turned into a State of Confusion and Civil War; and to say, That he acts against Law, that the Government would thereby be in Danger to be lost, and quick Subversion would follow? This cannot be the common and ordinary understanding of these Words.

If therefore the Plaintiff by speaking these Words was in no Hazard, nor any wise Damnified; if he was not touched in his Loyalty as a Peer, nor in Danger of his Life as a Subject; if he was not thereby subjected to any Corporal or Pecuniary Punishment, nor charged with any Breach of Oath, nor with a particular Miscarriage in any Office; if the Words are so general that they import no Scandal, and are neither capable of any Justification; and lastly, if they are not such horrible Lies as are intended to be punished by the Statute; for these Reasons he concluded the Action would not lie, and therefore prayed, that the Judgment might be arrested.

Serjeant Baldwin and Serjeant Barrel argued on the same Side for the Defendant, but nothing was mentioned by them which is not fully insisted on in the Argument of Serjeant Maynard, for which Reason I have not reported their Arguments.

But Pemberton, Serjeant, who argued for the Plaintiff, said, That it would conduce much to the understanding of the Statute of 2 R. 2. cap. 5. upon which this Action of Scandalum Magnatum was grounded, to consider the Occasion of the making of it. Ex parte Quer.

In those Days, the English were quite of another Nature and Genius from what they are at this Time; the Constitution of this Kingdom was then Martial, and given to Arms, the very Tenures were Military, and so were the Services, as Knights-Service, Castle-Guard and Escuage. There were many Castles of Defence in those Days in the Hands of private Men; their Sports and Pastimes were such as Tilts and Turnaments, and all their Imployments were tending to breed them up in Chivalry.

Those who had any Dependency upon Noble-men, were enured to Bows and Arrows, and to signalize themselves in Valour it was the only Way to Riches and Honour: Arts and Sciences had not got such Ground in the Kingdom as now; but the Commons had almost their Dependance upon the Lords, whose Power then was exceeding great, and their Practices were con-

formable to their Power; and this is the true Reason why so few Actions were formerly brought for Scandals, because when a Man was injured by Words, he carved out his own Remedy by his Sword.

There are many Statutes made against riding privately armed, which Men used in those Days, to repair themselves of any Injury done unto them, for they had immediately Recourse to their Arms for that Purpose, and seldom or never used to bring any Actions for Damages.

This was their Revenge; and having thus made themselves Judges in their own Cases, it was reasonable that they should do themselves Justice with their own Weapons. But this Revenge did not usually end in private Quarrels, they took Parties, ingaged their Friends, their Tenants and Servants on their Sides, and by such Means made great Factions in the Commonwealth, by Reason whereof the whole Kingdom was often in a Flame, and the Goverment as often in Danger of being subverted; so that Laws were then made against wearing Liveries or Badges, and against riding armed.

This was the Mischief of those Times; to prevent which, this Statute of R. 2. was made, and therefore all provoking and vilifying Words, which were used before to exasperate the Peers, and to make them betake themselves to Arms, by the Intent of this Act are clearly forbidden, which was made chiefly to prevent such Consequences; for it was to no Purpose to make a Law, and thereby to give a Peer an Action for such Words, as a common Person might have before the making of the Statute; and for which the Peer himself had a Remedy also at the Common Law, and therefore needed not the Help of this Act.

If then the Design of this Statute was to hinder such Practices as aforesaid, the next Thing to be considered is, what was usual in those Days to raise the Passions of Peers to that Degree, and that will appear to be not only such Things as imported a great Scandal in themselves, or such for which an Action lay at the Common Law, but even such Things as savoured of any Contempt of their Persons; and such as brought them into Disgrace with the Commons, for hereby they took Occasion of Provocation and Revenge.

'Tis true, that very few Actions were brought upon this Statute in some considerable Time after it was made, for though such Practices were thereby prohibited, the Lords did not presently apply apply themselves to the Remedy therein given, but continued the Military Way of Revenge to which they had been accustomed.

As

As to the First Objection that hath been made, he gave no Answer to it, because it was not much insisted upon on the other Side, whether an Action would lie upon this Statute, for the very Words of it are sufficient Ground for an Action; and 'tis very well known, that where-ever an Act prohibits an evil Thing, the Person against whom such Thing is done, may maintain an Action. Maxim.

This Statute consists of Two Parts, the First is prohibitory, viz. That no Man shall do so, &c. Then comes the additional Clause, and saith, That if he do, he shall incur such Penalty. 'Tis on the first Part that this Action is grounded; and so it was in the Earl of Northampton's Case, in that Report which goes under the Name of the Lord Coke's 12th Report, where by the Resolution of all the Judges in England, except Flemming who was absent, it was adjudged, that it was not necessary that any particular Crime should be fixed on the Plaintiff, or any Offence for which he might be indicted. Vide Ante.

So are the Authorities in all the Cases relating to this Action. In the Lord * Cromwel's Case for these Words, You like those who maintain Sedition. In the Lord of Lincoln's Case, My Lord is a base Earl, and a paultry Lord, and keepeth none but Rogues and Rascals like himself. In the Duke of Buckingham's Case, He has no more Conscience than a Dog. In the Lord * Marquess of Dorchester's Case, He is no more to be valued than the black Dog which lies there. All which Words were held Actionable, and yet they touch not the Persons in any Thing concerning the Government, or charge them with any Crime, but in Point of Dignity or Honour; and they were all villifying Words, and might give Occasion of Revenge. * 4 Co. 13. b. 2 Cro. 194. * Hill. 16 Car. 2. Rot. 1269. Affirmed in Writ of Error in *B. R.*

And so are the Words for which this Action is brought, they are Rude, Uncivil, and Ill-natured; Unworthy, is as much as to say, Base and Ignoble, a contemptible Person, and a Man of neither Honour or Merit. And thus to speak of a Noble-man, is a Reflection upon the King, who is the Fountain of Honour, that gives it to such Persons who are (in his Judgment) deserving, by which they are made capable of advising him in Parliament, and it would be very dishonourable to call unworthy Men thither.

'Tis likewise a Dishonour to the Nobility to have such a Person to sit among them as a Companion, and to the Commons to have their Proceedings in Parliament transmitted to such Peers: So that it tends to the Dishonour of all Dignities, both of King, Lords and Commons, and thereby Discords may arise between the Two Houses, which is the Mischief intended to be remedied by this Act.

Then

Then the following Words are as ſcandalous; for to ſay, A Man acts againſt Law and Reaſon, imports ſeveral ſuch Acts done; a Man is not denominated to be unworthy by doing of one ſingle Act; for in theſe Words more is implied, than to ſay, he hath done an unworthy Thing; for the Words ſeem to relate to the Office which the Plaintiff had in the Country, as Lord Lieutenant, which is an Office of great Honour; and can any Thing tend to cauſe more Diſcord and Diſturbance in the Kingdom, than to ſay of a great Officer, That he acts according to the Dictates of his Will and Pleaſure? The Conſequence of which is, that he will be rather ſcorned than obeyed.

It hath been objected, That the Words are general, and charge him not with any Act.

Anſw. The Scandal is the greater; for 'tis not ſo bad to ſay, A Man did ſuch a particular Thing againſt Law and Reaſon, as to ſay, he acts againſt Law; which is as much as to ſay, his conſtant Courſe and Practice is ſuch: And to ſay, that the Words might be meant of breaking a Penal Law, that is a forreign Conſtruction; for the plain Senſe is, he acts againſt the known Laws of the Kingdom, and his Practice and Deſigns are ſo to do, for he will be guided neither by Law or Reaſon.

Object. It has been objected, That the Scandal muſt be falſe: But whether true or not, there can be no Juſtification here, becauſe they are ſo general that they cannot be put in Iſſue.

Anſw. He agreed, that no Action would lie upon this Statute if the Words were true; but in ſome Caſes, the divulging of a Scandal was an Offence at the Common Law: Now to argue (as on the other Side) that the Defendant cannot juſtifie, and therefore an Action will not lie, is a falſe Conſequence; becauſe Words may be Scandalous and Derogatory to the Dignity of a Peer, and yet the ſubject Matter may not be put in Iſſue.

He agreed alſo, that Occaſional Circumſtances may extenuate and excuſe the Words, though ill in themſelves; but this cannot be applied to the Caſe in Queſtion, becauſe the Words were not mitigated: The Defendant pleaded Not Guilty, and inſiſted on his Innocence; the Jury have found him guilty, which is an aggravation of his Crime; if he would have extenuated them by any Occaſion upon which they were ſpoken, he ſhould have pleaded it ſpecially, or offered it in Evidence, neither of which was done.

This Act is to be taken favourably for him againſt whom the Words are ſpoken, becauſe 'tis to prevent great Miſchiefs which may fall out in the Kingdom, by rude and uncivil Diſcourſes; and in ſuch Caſes 'tis uſual for Courts rather to enlarge

large the Remedy, than to admit of any Extenuation; for which Reasons, he prayed that the Plaintiff might have his Judgment.

It was argued by Serjeant Calthorp on the same Side, and to the same Effect.

Afterwards this Term, all the Judges argued this Case seriatim at the Bench. And first, Justice Scroggs said, That the Greatness of the Damages given should not prevail with him, either on the one Side or the other; at the Common Law, no Action will lie for such Words, though spoken of a Peer, for such Actions were not formerly much countenanced: But now since a Remedy is given by the Statute, Words should not be construed either in a rigid or mild Sense, but according to the genuine and natural Meaning, and agreeable to the common Understanding of all Men. Argument at the Bench.

At the Bar the strained Sense for the Plaintiff is, That these Words import, He is no Man of Honour; and for the Defendant, that they import no Scandal, and that no more was meant by them but what may be said of every Man.

'Tis true, in respect of God Almighty, we are all Unworthy; but the subsequent Clause explains what Unworthiness the Defendant intended, for he infers him to be Unworthy, because he acts against Law and Reason.

Now whether the Words thus explained fix any Crime on the Plaintiff, is next to be considered; and he was of Opinion, that they did fix a Crime upon him; for to say, He is an unworthy Man, is as much as to say, He is a vitious Person, and is the same as to call him a corrupt Man, which in the Case of a Peer is Actionable; for general Words are sufficient to support such an Action, though not for a common Person.

To say, A Man acts against Law and Reason, is no Crime, if he do it ignorantly; and therefore if he had said, My Lord was a weak Man, for he acts against Law and Reason, such Words had not been Actionable; but these Words as spoken do not relate to his Understanding, but to his Morals; they relate to him also as a Peer (though the contrary has been objected) that they relate to him only as a Man, which is too nice a Distinction; for to distinguish between a Man and his Peerage, is like the Distinction between the Person of the King and his Authority, which hath been often exploded; the Words affect him in all Qualities, and all Relations.

It has been also objected, That the Words are too general; and the like Case of the Bishop's Return, that a Man is Criminosus,

nosus, which is not good: But though they are general in the Case of a Peer, they are actionable; for to say of a Bishop, That he is a wicked Man, these are as general Words, and yet an Action will lie.

It has been also objected, That general Words cannot be justified; but he was of another Opinion, as if the Plantiff, who was Lord Lieutenant of the County, had laid an unequal Charge upon a Man, who upon Complaint made to him, ordered such Charge to stand, and that his Will in such Case should be a Law: If the Person should thereupon say, That the Lord had done Unworthily, and both against Law and Reason; those Words might have been justified, by shewing the special Matter, either in Pleading or Evidence.

'Tis too late now to examine whether an Action will lie upon this Statute, that must be taken for granted, and therefore was not much insisted on by those who argued for the Defendant, for the Authorities are very plain, that such Actions have been allowed upon this Statute.

The Words, as here laid to be spoken, are not so bad as the Defendant might speak, but they are so bad that an Action will lie for them; and though they are general, yet many Cases might be put of general Words which import a Crime, and were adjudged actionable.

The Earl of Leicester's Case, He is an Oppressor: The Lord of Winchester's Case, He kept me in Prison 'till I gave him a Release; these Words were held actionable, because the plain Inference from them is, That they were Oppressors. The Lord Abergavenny's Case, He sent for me and put me into Little Ease: It might be presumed, that that Lord was a Justice of Peace, as most Peers are in their Counties, and that what he did was by Colour of his Authority; so are all the Cases cited by those who argued for the Plaintiff, in some of which the Words were strained to import a Crime, and yet adjudged actionable; especially in the Case of the Lord Marquess of Dorchester, He is to be valued no more than a Dog; which are less slanderous Words than those at the Bar, because the Slander is more direct and positive.

It appears by all these Cases, that the Judges have always construed in Favour of these Actions, and this has been done in all Probability to prevent those Dangers that otherwise might ensue if the Lords should take Revenge themselves; for which Reasons he held the Action will lie.

Atkyns

Atkyns Juſtice, contra. This is not a common Action upon the Caſe, but an Action founded upon the Statute of the 2d of R. 2. upon the Conſtruction whereof the Reſolution of this Caſe will depend, whether the Action will lie or not. And as to that, he conſidered,

1. The Occaſion.
2. The Scope.
3. The Parts of the Statute.

1. The Occaſion of it is mentioned in Cotton's Abridgment of the Records of the Tower, f. 173. nu. 9 and 10. At the ſummoning of this Parliament, the Biſhop of St. David's declared the Cauſes of their Meeting, and told both the Houſes, of the Miſchiefs that had happen'd by divers ſlanderous Perſons, and Sowers of Diſcord, which he ſaid were Dogs that eat raw Fleſh; the Meaning of which was, That they devoured and eat one another: To prevent which, the Biſhop deſired a Remedy, and his Requeſt ſeemed to be the Occaſion of making this Law, for ex malis Moribus bonæ naſcuntur Leges.

2. The Scope of the Act was to reſtrain unruly Tongues from raiſing falſe Reports, and telling Stories and Lies of the Peers and Great Officers of the Kingdom; ſo that the Deſign of the Act was to prevent thoſe imminent Dangers which might ariſe and be occaſioned by ſuch falſe Slanders.

3. Then the Parts of the Act are Three, viz. Reciting the Offence and the Miſchief, then mentioning the ill Effects, and appointing of a Penalty.

From whence he obſerved,

1. That here was no new Offence made or declared; for nothing was prohibited by this Statute, but what was ſo at the Common Law before.

The Offences to be puniſhed by this Act, are mala in ſe, and thoſe are Offences againſt the Moral Law; they muſt be ſuch in their Nature, as bearing of falſe Witneſs; and theſe are Offences againſt a common Perſon, which he admitted to be aggravated by the Eminency of the Perſon againſt whom they were ſpoke; but every uncivil Word, or rude Expreſſion ſpoken, even of a Great Man, will not bear an Action; and therefore an Action will not lie upon this Statute for every falſe Lie, but it muſt be horrible as well as falſe, and ſuch as were puniſhable in the High Commiſſion Court, which were enormous Crimes, 12 Cro. 43.

By this Deſcription of the Offences, and the Conſequences and Effects thereof, he ſaid he could better judge whether the

Words were actionable or not; and he was of Opinion, That the Statute did not extend to Words of a small and trivial Nature, nor to all Words which were actionable, but only to such which were of a greater Magnitude, such by which Discord might arise between the Lords and Commons, to the great Peril of the Realm, and such which were great Slanders, and horrible Lies, which are Words purposely put into this Statute for the Aggravation and Distinction of the Crime; and therefore such Words which are actionable at the Common Law, may not be so within this Statute, because not horrible great Scandals.

He did not deny, but that these were undecent and uncivil Words, and very ill applied to that honourable Person of whom they were spoken; but no Body could think that they were horrible great Slanders, or that any Debate might arise between the Lords and Commons, by Reason such Words were spoken of this Peer, or that it should tend to the great Peril of the Kingdom, and the quick Destruction thereof: Such as these were not likely to be the Effects and Consequences of these Words, and therefore could not be within the Meaning of the Act, because they do not agree with the Description given in it.

2. Here is no new Punishment inflicted on the Offender; for at the Common Law, any Person for such Offences as herein are described might have been fined and imprisoned, either upon Indictment or Information brought against him, and no other Punishment is given here but Imprisonment.

Even at the Common Law, Scandal of a Peer might be punished by Pillory and Loss of Ears, 5 Co. 125. De Libellis Famosis, 12 Co. 37. 9 Co. 59. Lamb's Case. So that it appears this was an Offence at the Common Law, but aggravated now, because against an Act of Parliament, which is a positive Law; much like a Proclamation which is set forth to enforce the Execution of a Law, by which the Offence is afterwards greater.

He did agree, That an Action would lie upon this Statute, though there were no express Words to give it to a Peer; because where there is a Prohibition, and a Wrong and Damage arises to the Party by doing the Thing prohibited, in such Case the Common Law doth intitle the Party to an Action, 10 Co. 75. 12 Co. 100, 103. And such was the Resolution in the Earl of Northampton's Case, upon Construction of the Law as incident to the Statute; and as the Offence is greater because of the Act, and as the Action will lie upon the Statute, so the Party injured may sue in a qui tam, which he could not have done before the making this Law.

3. But

3. But that such Words as these were not actionable at the Common Law, much less by the Statute; for the Defendant spoke only his Judgment and Opinion, and doth not directly charge the Plaintiff with any Thing, and might well be resembled to such Cases as are in Rolls Abridgm. 1 part 57. pl. 30. which is a little more solemn, because adjudged upon a special Verdict; the Words were spoken of a Justice of Peace, Thou art a Blood-Sucker, and not fit to live in a Commonwealth. These were not held actionable, because they neither relate to his Office, or fix any Crime upon him. Fol. 43. in the same Book, Thou deservest to be hanged, not actionable, because it was only his Opinion.

So where the Words are general, without any particular Circumstances, they make no Impression, and gain no Credit; and therefore in Cro. Car. 111. 1 Roll. Abridgm. 107. pl. 43. You are no true Subject to the King; the Action would not lie.

In this Case 'tis said, the Plaintiff acts against Law, which doth not imply a Habit in him so to do; and when Words may as well be taken in a mild as in a severe Sense, the Rule is, quod in mitiori sensu accipienda sunt. Now these Words are capable of such a favourable Construction, for no more was said of the Plaintiff, than what in some Sense may be said of every Person whatsoever; for who can boast of his Innocency? Who keeps close in all his Actions to Law and Reason? And to say, A Man acts against both, may imply that he departed from those Rules in some particular Cases, where it was the Error of his Judgment only.

In the Duke of Buckingham's Case, Sheppard's Abridgment 1 part, f. 28. Viz. You are used to do Things against Law; and mentions a particular Fact there indeed, because of Usage: Of the ill Practice, it was held that an Action lies; but if he had been charged for doing a Thing against Law but once, an Action would not lie.

He then observed, how the Cases which have been adjudged upon this Statute agree with the Rules he had insisted on in his Argument, which Cases have not been many, and those too of late Times; in respect of the Antiquity of the Act, which was made almost 300 Years since, Anno 1379. and for 120 Years after no Action was brought, the First that is Reported was 13 H. 7. Keilway 26. So that we have no contemporanea expositio of the Statute to guide an Opinion, which would be a great Help in this Case, because they who make an Act best understand the Meaning; but now the Meaning must be

collected from the Statute it self, which is the best Exposition, as the Rule is given in Bonham's Case, 8 Co. Vide the Case in 13 H. 7.

The next Case in Time, is the Duke of Buckingham's Case, 4 H. 8. Cromp. Jur. of Courts, f. 13. You have no more Conscience than a Dog. Lord Abergavenny against Cartwright, in the same Book, You care not how you come by Goods; in both which Cases, the Words charge the Plaintiff with particular Matter, and give a Narrative of something of a false Story, and do not barely rest upon an Opinion. In the Bishop of *Norwich* his Case, Cro. Eliz. 1. Viz. You have writ to me that which is against the Word of God, and to the Maintainance of Superstition. These were held actionable, because they refer to his Function, and greatly defame him, and yet he had but 500 Marks Damages. 29 & 30 Eliz. 1 Cro. 67. The Lord *Mordant* against *Bridges*; My Lord *Mordant* did know that *Prude* robbed *Shotbolt*, and bid me compound with *Shotbolt* for the same, and said, He would see me satisfied for the same, though it cost him an Hundred Pounds; which I did for him being my Master, otherwise the Evidence I could have given would have hanged *Prude*: These Words were held actionable, and 1100 l. Damages given; and in all the other Cases which have been mentioned upon this Statute, and where Judgment was given for the Plaintiff, the Words always charge him with some particular Fact, and are positive and certain, but where they are doubtful and general, and signifie only the Opinion of the Defendant, they are not actionable.

The Words in the Case at Bar, neither relate to the Plaintiff as a Peer, or a Lord Lieutenant, and charge him with no particular Crime; so that from the Authority of all these Cases, he grounded his Opinion that the Action would not lie; and he said, If Laws should be expounded to wrack People for Words, instead of remedying one Mischief, many would be introduced; for in such Case they would be made Snares for Men.

The Law doth bear with the Infirmities of Men, as Religion, Honour and Vertue doth in other Cases; and amongst all the excellent Qualities which adorn the Nobility of this Nation, none doth so much as forgiving of Injuries; Solomon saith, That 'tis the Honour of a Man to pass by an Infirmity. Which if the Plaintiff should refuse, yet the Defendant (if he thinks the Damages excessive) is not without his Remedy by Attaint, for he said, he could shew where an Attaint was brought against a Jury for giving 60 l. Damages.

He

He farther said, That he could not find that any Judgment had been either reversed or arrested upon this Statute, and therefore it was fit that the Law should be settled by some Rule, because 'tis a wretched Condition for People to live under such Circumstances, as not to know how to demean themselves towards a Pær; and since no Limits have been hitherto prescribed, 'tis fit there should be some now, and that the Court should go by the same Rules in the Case of a Peer, as in that of a common Person; that is, not to construe the Words actionable without some particular Crime charged upon the Plaintiff, or unless he alledge special Damages; for which Reasons he held that this Action would not lie.

Wyndham Justice accorded with Scroggs; and the Chief Justice North agreed with them in the same Opinion; his Argument was, viz.

First, He said that he did not wonder that the Defendant made his Case so solemn, being loaded with so great Damages; but that his Opinion should not be guided with that or with any Rules but those of Law, because this did not concern the Plaintiff alone, but was the Case of all the Nobility of England; but let it be never so general, and the Conveniences or Inconveniences never so great, he would not upon any such Considerations alter the Law.

He said, that no Action would lie upon this Statute, which would not lie at the Common Law; for where a Statute prohibits a Thing generally, and no particular Man is concerned, an Offence against such a Law is punishable by Indictment; but where there is a particular Damage to any Person by doing the Thing prohibited, there an Action will lie upon the Statute, and so it will at the Common Law.

The Words therefore which are actionable upon this Statute, are so at the Common Law.

This Statute extends only to Peers or other great Officers; now every Peer, as such, is a great Officer, he has an Office of great Dignity, he is to support the King by his Advice, of which he is made capable by the great Eminency of his Reputation, and therefore all Words which reflect upon him as he is the King's Councellor, or as he is a Man of Honour and Dignity, are actionable at the Common Law.

In the ordinary Cases of Officers, 'tis not necessary to say that the Words were spoken relating to his Office, as to say of a Lawyer that He is a Sot or an Ignoramus; or of a Tradesman, He is a Bankrupt,

Bankrupt, the Action lies, though the Words were not spoken of either as a Lawyer or Tradesman.

He did not think that Judges were to teach Men by what Rules to walk, other than what did relate to the particular Matter before them, all other Things are gratis dicta: Neither would he allow that Distinction, that an Action would not lie where a Man spoke only his Opinion; for if that should be admitted, it would be very easy to scandalize any Man, as, I think such a Judge is corrupt, or, I am of Opinion that such a Privy Councellor is a Traytor: And can any Man doubt whether these or such like Words are actionable or not, because spoken only in the Sense of the Person? 'Tis true, in some Cases where a Man speaks his own particular Dislesteem, an Action will not lie; as if I say, I care not for such a Lord; but that differs much where a Man speaks his Opinion with Reference to a Crime, for Opinions will be spread, and will have an implicit Faith, and because one Man believes it, another will; and 'tis upon this Ground that all the Cases which have been since the Statute are justified; and so was the late Case of * the Marquess of Dorchester, He is no more to be valued than the Black Dog which lies there, which were Words of Dislesteem, and only the Opinion of the Defendant; in which Case Judgment was affirmed in a Writ of Error.

* Sid. 233.

Object. If it be objected, to what Purpose this Statute was made if no Action lies upon it, but what lay at the Common Law.

Answ. The Plaintiff now upon the Statute must prosecute tam pro Domino Rege quam pro seipso, which he could not do at the Common Law. And it has been held in the Star-Chamber, That if a Scandalum Magnatum be brought upon this Statute, the Defendant cannot justifie, because 'tis brought qui tam, &c. and the King is concerned; but the Defendant may explain the Words, and tell the Occasion of speaking of them; if they are true, they must not be published, because the Statute was to prevent Discords.

Object. These Words carry in them no Dislesteem.

Answ. According to a common Understanding, they are Words of Disrespect and of great Dislesteem; for 'tis as much as to say, That the Plaintiff is a Man of no Honour, he is one who lives after his own Will, and so is not fit to be employed under the King: If any precedent Discourse had qualified the speaking these Words, it ought to have been shewn by the Defendant, which is not done; and therefore he concluded that the Words, notwithstanding

ſtanding what was objected were actionable; and ſo by the Opinion of him, Wyndam and Scroggs Juſtices, Judgment was given for the Plaintiff.

Atkins, Juſtice, of a contrary Opinion.

Anonymus.

AN Action of Aſſault, Battery, Wounding and falſe Impriſonment for an Hour was brought againſt the Defendant, who pleads, quoad venire vi & armis Not-Guilty; and as to the Impriſonment, he juſtified as a Servant to the Sheriff attending upon him at the Time of the Aſſize, from whom he received a Command to bring the Plaintiff (being another of the Sheriff's Servants) from the Conventicle, where finding of him, he (to wit, the Defendant) did molliter manus imponere upon the Plaintiff, and brought him before his Maſter, quæ eſt eadem tranſgreſſio; To this the Plaintiff demurred, and ſhewed for Cauſe, Amendment after a Demurrer joined and before Judgment given, good.

1. That the Subſtance of the Juſtification is not good, becauſe the Servant could not thus juſtifie, though his Maſter might; for the Lord may beat his Villain without a Cauſe, but if he command another to do it, an Action of Battery lies againſt him, 2 H. 4. 4. But though this might have been good if well pleaded, yet 'tis not good as pleaded here; for, 2 Cro. 360.

2. The Defendant ſaith, quoad venire vi & armis Not-Guilty, but ſaith nothing of the Wounding which cannot be juſtified, and therefore this Plea is not good; for which Reaſon it was clearly reſolved that the Plea was ill, but the Court inclined that the Subſtance of the Plea was well enough. Harding *and* Ferne, Poſtea.

The Chief Juſtice and Juſtice Scroggs were of Opinion, That a Man may as well ſend for his Servant from a Conventicle as from an Alehouſe, and may keep him from going to either of thoſe Places: And the Chief Juſtice ſaid, That he once knew it to be Part of a Marriage-Agreement that the Wife ſhould have Leave to go to a Conventicle.

But in this Caſe, Leave was given to amend the Plea, and put in quoad vulnerationem Not-Guilty; and it was held, That though the Parties had joined in Demurrer, yet the Defendant might have Liberty to amend before Judgment given. Sid. 107.

Singleton

Singleton *versus* Bawtree *Executor.*

Traverse must be where the Charge in the Declaration is not fully answered.

ASsumpsit against the Defendant as Executor, who pleads the Testator made one J. S. Executor, who proved the Will and took upon him the Execution thereof, and administred the Goods and Chattels of the Testator, and so concludes in Abatement, Et petit Judicium de Brevi, with an Averment that J. S. Superstes & in plena vita existit.

To this Plea the Plaintiff demurred, because the Defendant ought to have traversed absq; hoc that he was Executor, or administred as Executor, and so are all the Pleadings, 9 H. 6. 7. 4 H. 7. 13. 7 H. 6. 13.

But Serjeant Pemberton for the Defendant said, That there is a Difference when Letters of Administration are granted in case the Party die Intestate, and when a Man makes a Will, and therein appoints an Executor, for in that Case the Executor comes in immediately from the Death of the Testator; but when a Man dies Intestate, the Ordinary hath an Interest in the Goods, and therefore he who takes them, is Executor de son Tort, and may be charged as such; but 'tis otherwise generally, where there is a Will and a rightful Executor, who proveth the same, for he may bring a Trover against the Party for taking of the Testator's Goods, though he never had the actual Possession of them; and therefore the Taking in such case will not make a Man Executor de son Tort, because there is another lawful Executor: But 'tis true, that if there be a special Administration, 'tis otherwise; as if a Stranger doth take upon him to pay Debts or Legacies, or to use the Intestate's Goods, such an express Administration will make him Executor de son Tort, and liable; as in Read's Case, 5 Co.

So in this Case the Defendant pleads, that J. S. was Executor, which prima facie discharges him; for to make him chargeable, the Plaintiff ought in his Replication to set forth the special Administration, that though there was an Executor, yet before he assumed the Execution or proved the Will, the Defendant first took the Goods, by which he became Executor of his own Wrong, and so to have brought himself within this Distinction, (which was the Truth of this Case) and that would have put the Matter out of Dispute; which not being done, he held the Plea to be good, and so prayed Judgment for the Defendant.

The

The Court were of Opinion, that Prima facie this was a good Plea; for where a Man *confesses and avoids, he need not traverse, and here the Defendant had avoided his being chargeable as Executor de son Tort, by saying, That there was a rightful Executor who had administred the Testators whole Estate; but the Surmise of the Plaintiff and the Plea of the Defendant being both in the *Affirmative, no Issue can be joined thereon; and therefore the Defendant ought to have traversed that he was Executor, or ever administred as Executor, the rather because his Plea gives no full Answer to the Charge in the Declaration, being charged as Executor, who pleads that another was Executor, and both these Matters might be true, and yet the Defendant liable as Executor de son Tort, which (notwithstanding Iniquum non est præsumendum) may be well intended here; and so Judgment was given against the Defendant that this was no good Plea.

* 2 Sand. 28.

*2 Cro. 579. pl. 9. Sid. 341. 1 Sand. 338.

Adams *versus* Adams.

DEBT upon Bond to perform an Award, so that it be made before or upon the 22d Day of December, or to choose an Umpire.

Award, Exceptions thereunto overruled.

The Defendant pleads no Award made: The Plaintiff replies and sets forth an Award, and assigns a Breach: The Defendant demurs.

1. That here is no good Award, because the Arbitrators were to make it before or upon the 22d Day of December, and if they could not agree, to choose an Umpire: Now the Award set forth in the Replication was made by an Umpire chosen after the 22d Day of December, which the Arbitrators had not Power by the Submission to choose, Sed non allocatur, because they might have made their Award upon the 22d Day of December, and therefore could not choose an Umpire 'till afterwards; for their Power was only determined as to the making an Award.

Mod. Rep. 274. 2 Sand. 133.

2. Because the Umpire recites, that the Parties submitting had bound themselves to stand to his Award which is not true, Sed non allocatur, because 'tis but Recital.

Antea.

3. The Award is, That the Defendant should pay the Plaintiff Two Sums at several Times, and that several Releases shall be given presently, and so the Bond and the Money would be discharged; and for that Reason the Awarding the Release was void against the Plaintiff, and by consequence there is nothing on his

3 Mod. 264. Infra. 309.

his Side to be done; and the Court were all of Opinion, that for this last Reason the Award was not good.

Serjeant Baldwyn, who was of Council for the Plaintiff, said, That it was an Exception which he could not answer if true, but said, that the Award was not that Releases should be given presently, but that the Money should be paid and Releases given: By which it appears by the very Method and Order of the Award, that the general Releases were not to be given 'till after the Money paid; and that being the Case, the Court were clear of Opinion, that it was well enough; and so Judgment was given for the Plaintiff.

Brook *versus Sir* William Turner.

Feme Covert made a Will and disposed of her Estate, and good.

IN a Prohibition to the Spiritual Court to prove the Will of Philippa Brooks by Sir William Turner her Executor:

A Trial at the Bar was had, in which the Case was, viz. That James Phillips, by Will in Writing dated 24 Aprilis, 1671. inter alia gave to Philippa for Life, in lieu and full of her Dower, all his Houses in Three-Crown-Court in Southwark, purchased by him of one Mr. Keeling; another House in Southwark purchased of one Mr. Bows, and all his Houses in New-Fish Street, Pudding-Lane, Buttolph-Lane, Beer-Lane, Duxfield-Lane, and Dowgate, London; and died.

That afterwards there being a Treaty of Marriage between the Plaintiff Mr. Brooks and Philippa Phillips, it was agreed, that all the said Houses and Rents, and Profits thereof, and all Debts, ready Money, Jewels, and other real and personal Estate whatsoever, or wherein Philippa, or any in Trust for her, were interessed or possessed, should at any Time as well before as after the Marriage be disposed in such manner as should be agreed on between them.

And thereupon by Indenture Tripartite between Mr. Brook of the first Part, the said Philippa Phillips of the second Part, and William Williams and Francis Gillow of the third Part, reciting the said Will of James Phillips and the said Agreement, the said Philippa in Consideration of a Shilling paid to her by Williams and Gillow, did with the full and free Consent of the said Edward Brook the now Plaintiff, grant, bargain and sell to the said Williams and Gillow all the said Houses devised by the last Will of the said James Phillips, in Trust that the said Trustees should permit her to receive and enjoy the whole Rents and Profits of all the

the Houſes purchaſed of Mr. Keeling, and of all the Houſes in Beer-Lane, and of Two of the Houſes in Broadſtreet in the Poſſeſſion of James and Worſley, and the Quarters Rent only due at Chriſtmas then laſt paſt, and no more, ſaving to Philippa all former Rents and Arrears thereof to be received by her, and not by Mr. Brook, and to be imployed as therein after was mentioned.

And upon this farther Truſt, that after Mr. Brook's Death, in caſe the ſaid Philippa ſurvived, that then the Truſtées ſhould permit Philippa and her Aſſigns from Time to Time to grant, ſell and diſpoſe of the reſt of the Premiſſes, and all others whereof ſhe was ſeiſed or poſſeſſed, as ſhe ſhould think fit; and alſo to receive, diſpoſe of and enjoy all the Rents and Profits of the Premiſſes (not thereby appointed to be received by the Plaintiff) for her only particular and ſeparate Uſe, and not for the Uſe of the Plaintiff, without any Account to be given for the ſame, and not to be accounted any Part of Mr. Brook's Eſtate; and that the Acquittances of the ſaid Philippa be good Diſcharges againſt the Plaintiff; and the ſaid Truſtees to join with Philippa in the Sale and Diſpoſition of the Premiſſes.

And Philippa in farther Conſideration of the ſaid Marriage, agreed to pay to Mr. Brook on the Day of Marriage 150 l. and to deliver him ſeveral Bonds and Securities for Money in the ſaid Indenture particularly named.

And the ſaid Philippa in farther purſuance of the ſaid Agreement, and in Conſideration of a Shilling paid to her by the ſaid Truſtées, did with the like Aſſent aſſign to them all her Jewels, Rings, Money, &c. and other her real and perſonal Eſtate, upon Truſt that they ſhould permit her to enjoy the ſame to her own ſeparate and diſtinct Uſe, and to diſpoſe thereof from Time to Time as well before the ſaid Marriage as afterwards, as ſhe ſhould think fit without any Accompt, and for want of ſuch Limitation or Appointment, in Truſt for her, her Executors, Adminiſtrators or Aſſigns; and the Plaintiff not to hinder or impeach the ſame, and not to be taken as any Part of his Eſtate, or be ſubject to his Debts, Legacies or Engagements.

And the Plaintiff covenanted, That if the Marriage took effect, the Truſtees ſhould quietly enjoy the Premiſſes, and Philippa to diſpoſe thereof without Trouble or Moleſtation by him, his Executors, &c. and that Philippa (notwithſtanding the Marriage) ſhould at any Time, either before or after, have Liberty by Deed or Will in Writing by her publiſhed in the Preſence of Two or more credible Witneſſes, or otherwiſe howſoever, at her Pleaſure to give and diſpoſe of all her real and perſonal Eſtate, Goods, Chattels, &c. whereof ſhe was poſſeſſed before the ſaid intended Marriage,

or at any Time after, or any other Person in Trust for her (except such Part thereof as was thereby agreed to be paid to, and received by the Plaintiff) to such Person or Persons, and to such Use and Uses, Intents and Purposes as she should think fit, and that the Plaintiff should assent thereunto, and not impeach the same in Law or Equity.

The Marriage shortly afterwards took Effect, and Philippa by Will in Writing gave all her Estate away in Legacies and Charitable Uses, and she devised to the Plaintiff 20 l. to buy him Mourning, and gave to Sir William Turner the Defendant 100 l. and made him Executor; and she devised to Mr. Hays and to Mr. Grace 20 l. apiece, whom she made Overseers of her Will, and died. There was neither Date or Witnesses to this Will, save only the Month and Year of our Lord therein mentioned; and that this Will not being proved in the Spiritual Court, the Plaintiff moved for a Prohibition, and the Defendant took Issue upon the Suggestion.

In which Case, these Points were resolved by the Court:

Mod. Rep. 211. 1. If there be an Agreement before Marriage that the Wife may make a Will, if she do so, 'tis a good Will, unless the Husband disagrees; and his Consent shall be implied 'till the contrary appear. And the Law is the same though he knew not when she made the Will, which when made, 'tis in this Case, as in others, Ambulatory 'till the Death of the Wife, and his Dissent thereunto; but if after her Death he doth consent, he can never afterwards dissent, for then he might do it backwards and forwards in infinitum.

2. If the Husband would not have such Will to stand, he ought presently after the Death of the Wife to shew his Dissent.

3. If the Husband consent that his Wife shall make a Will, and accordingly she doth make such a Will, and dieth, and if after her Death he comes to the Executor named in the Will, and seems to approve her Choice, by saying, He is glad that she had appointed so worthy a Person, and seemed to be satisfied in the main with the Will, and recommended a Coffin-maker to the Executor, and a Goldsmith for making the Rings, and a Herald-Painter for making the Escutcheons; this is a good Assent, and makes it a good Will, though the Husband when he sees and reads the Will (being thereat displeased) opposes the Probate in the Spiritual Court by entring Caveats, and the like; and such Disagreement after the former Assent will not hurt the Will, because such Assent is good in Law, though he know not the particular Bequests in the Will.

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4. When there is an expreſs Agreement or Conſent that a Woman may make a Will, a little Proof will be ſufficient to make out the Continuance of that Conſent after her Death; and it will be needful on the other Side to prove a Diſagreement made in a ſolemn Manner, and thoſe Things which prove a Diſſatisfaction on the Husband's Part may not prove a Diſagreement, becauſe the one is to be more formal than the other; for if the Husband ſhould ſay, that he hoped to ſet aſide the Will, or by a Suit or otherwiſe to bring the Executor to Terms, this is not a Diſſent.

Sir Robert Howard *verſus* the Queens Truſtees and the Attorney General. *In the Dutchy.*

UPON a Bill exhibited in the Dutchy Court; The Queſtion was, Whether the Stewardſhip of a Manor was grantable in Reverſion or not? Jones 126.

The Attorney General and the Queen's Council, Butler and Hanmore, held that it was not: But Serjeant Pemberton and Mr. Thursby would have argued to the contrary; for they ſaid it might be granted in Fee, or for any leſs Eſtate, and ſo in Reverſion, for it may be executed by Deputy.

But this Queſtion ariſing upon a Plea and Demurrer, the Debate thereof was reſpited 'till the Hearing of the Cauſe, which was the uſual Practice in Chancery, as North, Chief Juſtice, who aſſiſted the Chancellor of the Dutchy, informed the Court.

And he ſaid, that in all Courts of Equity the uſual Courſe was; When a Bill is exhibited to have Money decreed due on a Bond, upon a Suggeſtion that the Bond is loſt, there muſt be Oath made of it, for otherwiſe the Cauſe is properly triable at the Common Law; and ſuch Courſe is to be obſerved in all the like Caſes, where the Plaintiff by Surmiſe of the Loſs of a Deed draws the Defendant into Equity; but if the Caſe be proper in its own Nature for a Court of Conſcience, and in caſe where the Deed is not loſt, the Remedy deſired in Chancery could not be obtained upon a Trial at Law; there, though it be alledged that the Deed is loſt, Oath need not be made of it: As if there be a Deed in which there is a Covenant for farther Aſſurance, and the Party comes in Equity, and prays the Thing to be done in Specie, there is no need of an Oath of the Loſs of ſuch Deed, becauſe if it is not loſt the Party could not at Law have the Thing for which he prayed Relief, for he could only recover Damages.

Note

Note also, That he said in the Case of one Oldfeild, That it was the constant Practice where a Bill is exhibited in Equity to foreclose the Right of Redemption, if the Mortgagor be foreclosed he pays no Costs; and though it was urged for him that he should pay no Costs in this Case, because the Mortagagee was dead, and the Heir within Age, and the Money could not safely be paid without a Decree, yet it being necessary for him to come into Equity, he must pay for that Necessity.

Note also the Difference between a Mortgage in Fee, and for Years; for if 'tis in Fee, the Mortgagor cannot have a Reconveyance upon Payment of the Money, 'till the Heir comes of Age.

It was agreed in this Case by the Court, That if there be Tenant for Life, Remainder in Fee, and they join in a Deed purporting an absolute Sale, if it be proved to be but a Mortgage he shall have his Estate for Life again, paying pro Rata, and according to his Estate; and so it shall be in the Case between Tenant in Dower and the Heir.

Lloyd *versus* Langford.

Lessee for Years makes an Assignment of his Term where Debt lies upon the Contract, and where not. 1 Ven. 242, 272.

IN a Special Verdict, the Case was: Viz. A. being Tenant in Fee of Lands, demised the same to B for Seven Years, B. re-demises the same Lands to A. for the said Term of Seven Years, reserving 20 l. Rent per Annum. A. dies, his Wife enters as Guardian to the Heir of A. her Son, and receives the Profits. B. brings Debt against her as Executrix de son Tort, in the Debet and Detinet; and whether this Action would lie or not, was the Question.

Serjeant Baldwyn, who argued for the Plaintiff, held, that it did lie, for though the Rent in this Case reserved did not attend the Reversion, because the Lessee had assigned over all his Term, yet an Action of Debt will lie for that Rent upon the Contract, Cro. Jac. 487. Witton *versus* Bye, 45 Ed. 3. 8. 20 E. 4. 13. Covenant will lie upon the Words Yielding and Paying.

If then here is a good Rent reserved, the Wife who receives the Profits, becomes Executrix de son Tort, and so is liable to the Payment.

It hath been held there cannot be an Executor de son Tort of a Term, but the Modern Opinions are otherwise; and it was held in the Case of Porter and Sweetman, Trin. 1653. in B. R. And that

that an Action of Debt will lie against him. Indeed such an Executor cannot be of a Term in futuro, and that is the Resolution in Kenrick and Burgess's Case, Moor Rep. Where in Ejectment upon Not Guilty pleaded, it appeared that one Okeham had a Lease for Years of the Lands in question, who died Intestate, which Lease his Wife assigned by Parol to Burgess; and then she takes out Letters of Administration, and assigns it again to Kenrick, who by the Opinion of the Court had the best Title.

But if one enter as Executor de son Tort, and sell Goods, the Sale is good; which was not so in this Case, because there was a Term in Reversion, whereof no Entry could be made, for which Reason there could be no Executor de son Tort to that, and therefore the Sale to Burgess before the Administration was held void.

And that there may be an Executor de son Tort of a Term, there was a late Case adjudged in Trin. 22 Car. 2. between Stevens and Car, which was, Lessee for Years rendring Rent dies Intestate, his Wife takes out Letters of Administration, and afterwards marries a second Husband, the Wife dies, and the Husband continues in Possession and receives the Profits: It was agreed, that for the Profits received he was answerable as Executor de son Tort, and the Book of 10 H. 11. was cited as an Authority to prove it.

Pemberton, Serjeant for the Defendant, would not undertake to answer these Points which are argued on the other Side, but admitted them to be plain against him, for he did not doubt but that Debt would lie upon the Contract, where the whole Term was assigned, and that there may be an Executor de son Tort of a Term; but he said, that which was the principal Point in the Case was not stirred: The Question was, Whether an Action of Debt will lie against the Defendant as Executor de son Tort, where there is no Term at all; for 'tis plain there was none in being in this Case, because when the Lessee re-demised his whole Term to the Lessor, that was a Surrender in Law, and as fully as if it had been actually surrendred; and therefore this was quite different from the Case, where Lessee for Years makes an Assignment of his whole Term to a Stranger, Debt will lie upon the Contract there, because an Interest passes to him in Reversion, and as to this Purpose a Term is in esse by the Contract of the Parties, and so it would here against the first Lessor, who was Lessee upon the Re-demise; but now because of the Surrender, the Heir is intituled to enter, and the Mo-

Ex parte Def.

ther

ther, who is the Defendant, enters in his Right as Guardian, which she may lawfully do.

If therefore Debt only lies upon the Contract of the Testator, as in truth it doth where the whole Term is gone, the Plaintiff cannot charge any one as Executor de son Tort in the Debet and Detinet.

And the whole Term is gone here by the Re-demise, which is an absolute Surrender, and not upon Condition, for in such Case the Surrenderor might have entred for Non-performance, and so it might have been revived: And of this Opinion was the whole Court in both Points, and would not hear any farther Argument in the Case; the Plaintiff having no Remedy at Law, the Court told him that he might seek for Relief in Chancery, if he thought fit.

Harman's *Case*.

IN Covenant the Breach assigned was, That the Defendant did not repair; he pleads generally quod reparavit & de hoc ponit se super Patriam, this was held good after a Verdict.

Quadring *versus* Downs, *& al'*.

Wardship cannot be where there is no Descent.

IN a Writ of Right of Ward, the Case was, viz. Sir William Quadring being seised of Lands in Fee, by Deed and Fine, settles them upon his Son William and his Wife for their Lives, the Remainder to the second Son in Tail, with divers Remainders over. The Grandfather dies, the Father and Mother dies, the eldest Son dies without Issue, and so the Land came to the second Son.

The Plaintiff intitles himself as Guardian in Soccage to the Wardship both of the Person and Lands of the Infant, whom the Defendant detained, and Serjeant Newdigate for him demurred, because where there is no Descent there can be no Wardship, for the second Son is in by Purchase and not by Descent, for here is no Mention of the Reversion in Fee, and therefore it may be intended that it was conveyed away; and besides, if it should be intended to continue to Sir William Quadring the Grandfather after this Settlement, yet it cannot be thought to descend

descend to the Ward, because 'tis not said who was Heir; for though it be said, that the Father of the Ward was Son to Sir William, yet 'tis not said Son and Heir, and of that Opinion was the whole Court in both Points; for there must be a Descent, or else there can be no Wardship; and it doth not appear that any Descent was here, because 'tis not said that the Reversion did descend, nor who was Heir to Sir William; which the Plaintiff perceiving, prayed Leave to amend, and it was granted.

In this Case it was said at the Bar, that one might be a Ward in Soccage, though he be in by Purchase, for the Guardian is to have no Profit, but is only a Curator, to do all for the Benefit of the Ward; and so there need be no Descent, as is necessary in the Case of a Ward in Chivalry; for that being in respect of the Tenure, the Guardian is to have Profit.

The Lord Chief Justice North said, He knew where there was some Doubt of the Sufficiency of the Guardian in Soccage, that the Court of Chancery made him give good Security. Nota.

Harding *versus* Ferne.

IN an Action of Assault, Battery and Imprisonment, 'till the Plaintiff had paid 11 l. 10 s. The Defendant pleads and justifies by Reason of an Execution, and a Warrant thereupon for 11 l. and doth not mention the 10 s. And upon Demurrer for this Cause, Judgment was given for the Plaintiff upon the first opening, because it appeared the Defendant took more than was warranted by the Execution. Antea Anonymus.

Ellis *versus* Yarborough *Sheriff of* Yorkshire.

IN an Action of Escape, the Plaintiff sets forth, That the Defendant arrested a Man upon a Latitat directed to him at the Suit of the Plaintiff, and afterwards suffered him to go at large.

The Defendant pleads the Statute of 23 H. 6. cap. 10. that he took good and sufficient Bail within the County according to the Statute.

The Plaintiff replies, That he let him go at large, absq; hoc that he took good and sufficient Bail within the County. To this the Defendant demurred.

Case lies not against the Sheriff though he take insufficient Bail, but must be amerced if the Defendants do not appear. Mod. Rep. 227. Antea 2 Sand. 59.

This Case was argued this Term by Serjeant Skipwith and Baldwyn for the Defendant, and by Serjeant Barrel and George Strode for the Plaintiff; and in their Arguments for the Defendant it was said, That the Plaintiff in this Case cannot maintain an Action of Escape, for where the Sheriff takes Bail, no Escape will lie against him.

Ex parte Def.

Sid. 23. 2 San. 60. Cro. Eliz. 624.

1. Because he is compellable by the Statute to let the Defendant to Bail.

2. If he have not the Defendant ready at the Return of the Writ, he may be amerced, which is the proper Remedy.

3. This Precept of letting the Defendant to Bail, being by Act of Parliament, is intended by the Direction of the Plaintiff himself, because all People are Parties to the making of an Act of Parliament.

Many Actions have been brought against Sheriffs, upon Suggestions that no Bail have been taken, and for which an Action on the Case will lie; but where there is Bail taken, the Sheriff hath done his Duty which he is commanded to do by the Statute; and if the Defendant doth not appear, the Sheriff is to be amerced, and he is the proper Judge of the Bail; the Plaintiff is no ways concerned therein whether good or bad.

Antea, Page and Tulse.

At the Common Law, the Defendant was to continue in Prison till he had satisfied the Plaintiff, to whom no Benefit was intended by this Statute, but rather an Ease to the Defendant, that he should be from thence discharged, giving good Bail; and the Reason why the Statute mentions such Bail, is in Favour of the Sheriff also, to secure him from Amerciaments; the Bail being then for his Indempnity, he is the sole Judge both of their Persons, Number, and Ability; for the Statute requires two Sureties, and that they shall be Men within the County; yet if there is but one, and he not of the County, and if the Bond taken by the Sheriff for the Appearance of the Defendant be but 40 l. and the Debt due to the Plaintiff be 400 l. 'tis well enough, because the Statute doth not restrain him to any Sum or Sureties, for he may take what Sum he please to force the Defendant to appear.

Cro. Eliz. 672.

2 Cro. 286.

And when this Security is taken, the Sheriff is neither compellable to assign it to the Plaintiff, or he to take it. 'Tis true, he doth usually assign it, but that is to discharge himself of the Amerciaments, which is the Way that the Plaintiff should pursue where he doth imagine the Bail to be insufficient.

If

If therefore this Statute was made for the Benefit and Eaſe of the Defendant, the Security therein directed is for the Indempnity of the Sheriff; and therefore if no Action will lie againſt him for taking of inſufficient Bail, 'tis as reaſonable that no Action ſhould lie againſt him when he hath taken Bail, which he is compelled to do, and ſo the Traverſe in this Caſe is immaterial, and Judgment ought to be given for the Defendant.

On the other Side it was argued, That an Action of Eſcape would lie againſt the Sheriff, if he did not take good Bail, which Matter may be traverſed; and though here if the Defendant had rejoined, the Iſſue had been, whether ſufficient Bail within the County or not, yet that Part of the Iſſue had not been material, for the only Matter had reſted upon the Sufficiency or Inſufficiency of the Bail in general. Like a Caſe adjudged in Mich. 14 Car. 2. in B. R. where a Woman had Power given her by her Husband to make a Will in the Preſence of two credible Witneſſes: It was pleaded that ſhe made a Will in the Preſence of A. and B. credible Witneſſes, and Iſſue was thereupon joined, and it was found to be made in the Preſence of C. and D. who were credible Witneſſes, and this was held to be good, becauſe the Subſtance was found, Viz. That it was made in the Preſence of two credible Witneſſes. Ex parte Quer. Antea.

The Defendant therefore here ought to have taken good and ſufficient Bail to bring himſelf within the Statute, and that is traverſable, and the Pleadings are well enough; for if there be good Bail, 'tis not material in what County they live.

Upon the Firſt Argument of this Caſe, the Lord Chief Juſtice inclined that an Action of Eſcape did lie at the Common Law againſt the Sheriff; for it was clear that he was to keep the Party arreſted in Priſon 'till the Debt was ſatisfied, and that if he had gone at large, it had been an Eſcape; the Sheriff then had no Excuſe but by this Statute, and to entitle himſelf to any Benefit thereby, he muſt purſue the very Directions therein preſcribed, and therefore ought to take good and ſufficient Bail; for otherwiſe the Statute would be eluded, if it be left in his Power to take what Bail he pleaſes; and he was of Opinion, that the Plaintiff had an Intereſt in the Security, and therefore the Sheriff was liable, if it was not good when firſt taken, but not if by any Accident afterwards the Bail miſcarry or become inſolvent.

And Juſtice Wyndham was of the ſame Opinion, That the Sheriff was liable; he differed only as to the Manner of the

Action, which he held should be a special Action on the Case, setting forth the whole Matter, and alledging that the Defendant did not take sufficient Bail.

Justice Atkyns said, The Case depends upon the Construction of that * Statute, which is very obscure, and the Opinions various which have been upon it: 'Tis plain, the Sheriff is compellable to take Bail, and that an Action lies against him if he refuses such as are sufficient when tendred; but the Question was now, whether it will lie against him for taking those who are Insufficient; and as to that he said, that many Authorities were in our Books, That the taking of Bail is left to the Sheriff's Discretion, and he is thereby to provide for his own Indempnity; for he must return a Cepi Corpus upon the Writ, he cannot return that he let him to Bail according to the Statute, and therefore inclined that the Action did not lie.

* 23 H. 6. cap. 10.

Scroggs Justice contra. He said, That this Statute designed the Benefit of the Creditor, that he might either get the Sheriff amerced, or have an Action; in both which Cases he might indempnifie himself by the Security he had taken. 'Tis true, he may let the Party to Bail, but 'tis sub modo, it must be upon good Bail; and if the Sheriff be Judge of the Security, 'tis an Argument that he is liable; for if he was not in Danger, he need not take Security.

But afterwards upon the Second Argument, the Chief Justice and the whole Court were of Opinion, That Judgment should be given for the Defendant.

North Chief Justice. The Common Law was very rigorous as to the Execution of Process; the Capias was, ita quod habeas the Body at the Day of the Return, and if the Sheriff had arrested one, it had been an Escape to let him go. Before the making of this Statute, the Sheriff usually took Sureties for the Appearance of the Prisoner, and by this Means used great Extortion, and took great Sums of Money; to prevent which Mischiefs this Statute was made, and so designed.

1. For the Ease of the Prisoner, the Sheriff being now compellable to take Security, which he was not obliged to do before.

2. To prevent Extortion, and therefore directs that a Bond shall be taken in such Manner, and with such Conditions, as is therein mentioned.

But the Sheriff, since the Statute, is much in the same Condition

tion as before, for he is to make the same Return of Cepi Corpus: 'Tis true, he may now let him go upon Bail, but as to the Creditor, he is to have him in Court to answer his Suit as before, and shall be amerced if he doth not appear at the Return of the Writ: So that tho' this Statute be an Ease to the Defendant, yet 'tis a Burthen to the Sheriff, who runs a greater Hazard since the making of this Act than before, because then he might keep him in Prison till the Debt was satisfied; but now he is obliged to let him at large upon Bail, from whom he is directed to take a Bond, which he may keep in his own hands to indempnifie himself: The Court can only amerce him, if the Defendant do not appear at the Return of the Process, and 'tis not material to the Party, whether the Sheriff take one or more Security, that being in his Discretion; some he must take, for otherwise 'tis directly in Opposition to the Statute: Neither is it material to the Party, whether they are such as are Sufficient; for if they are not, and the Defendant is thereupon discharged, this will not amount to an Escape; because nothing is done but what is pursuant to the Statute, and therefore he is no otherwise chargeable than by Amerciaments.

The Statute was made and intended for the Benefit of the Debtor, not of the Creditor, and there might be some Colour for the Action if the Sheriff might Return that he let him to Bail, for then it might have been necessary to have alledged the Sufficiency of them, which might have been traversed, but now he must pursue the Substance of the Statute so far as to take Bail; he is the proper Judge of the Sufficiency, and when the Bail is taken he must return a Cepi Corpus, so that he is only to be amerced till he bring in the Body, but an Escape will not lie against him.

Long's *Case*.

ONE Long was arrested in the Pallace-Yard, not far distant from the Hall Gate, the Court being then sitting; and being an Attorney of this Court, he, together with the Officer, was brought into Court, and the Officer was committed to the Fleet, that he might learn to know his Distance; and because the Plaintiff was an Attorney of the Court of King's-Bench, who informed this Court, that his Cause of Action was for 200 l. therefore the Court ordered that another of the Sheriff's Bayliffs should take Charge of the Prisoner, and that Mr. Robinson the Chief Prothonotary should go along with him to the Court of King's-Bench, which was done, and that Court being informed how the Case was, discharged the Defendant upon filing of Common Bail. Priviledge of an Attorney.

The

The Writ upon which this Long was arrested, was an Attachment of Privilege, which the Court supposed to be made on Purpose to ouſt him of his Privilege; for there was another Writ against him at the Sheriff's Office, at the Suit of another Person.

The Countess of Northumberland's *Case.*

Knights must be of the Jury where a Peer is concerned. 1 Mod. 226.

ADjudged, that where a Peer is Party, either Plaintiff or Defendant, two or more Knights must be returned of the Jury; and it was said that in Cumberland there was but one Freeholder who was a Knight, besides Sir Richard Stote, a Serjeant at Law; and the Court were of Opinion, that rather than there should be a Failure of Justice, a Serjeant of Law ought to be returned a Juryman; for his Privilege would not extend to a Case of Necessity.

Bell *versus* Knight. *In Banco Regis.*

Smiths Forges are chargeable with the Duty of Fire-Hearth.

IN an Action of Trover; Upon Not-Guilty pleaded, the Jury found a special Verdict, in which the Point was upon the Construction of the Statute of 14 Car. 2. c. 10. for the establishing of an Additional Revenue upon the King, his Heirs and Successors, for the better Support of his and their Crown and Dignity, by which it is enacted, That for every Fire-Hearth and Stove in every House, the Yearly Sum of 2 *s.* shall be paid to the King, other than such as in the said Act are exempted: Then comes a Proviso, which saith, That this Act shall not extend to charge any Blowing House, Stamp, Furnace or Kiln, *&c.* And the Question now was, Whether a Smith's Forge shall be charged with this Duty?

Winnington, Solicitor General, conceived that all Fire-Hearths are liable within the Body of the Act, and there is nothing to exempt them but what is in the Exception; and that a Smith's Forge cannot be called a Blowing-House within the Intent of the Act, notwithstanding the Jury have found that Smiths use Bellows to blow their Forges: For by Blowing-Houses, such Houses are meant as are in Staffordshire and Suffolk for the making of Iron, these were the Blowing-Houses intended by the Parliament to be excepted, and no other; for if Smiths Forges had been meant thereby, those would have been inserted in the Proviso as well as the other Things therein mentioned.

Words

Words are to be taken in a Common Understanding; for if a Traveller should enquire for a Blowing-House, no Body would send him to a Smith's Forge.

By the Opinion of the whole Court, it was adjudged upon the first Argument, That Smiths Forges are liable to this Duty; and so the Solicitor said it had been lately adjudged in this Court by the Opinion of Twisden, Wyld and Rainsford and that my Lord Chief Justice Hale was of the same Opinion; but Twisden said, That neither the Chief Justice or himself gave any Judgment upon the Merits, but upon a Point in Pleading. Curia.

Stroud *versus the Bishop of* Bath *and* Wells, *and Sir* George Horner. *In Communi Banco.*

IN a Quare Impedit, the Plaintiff alledges, That Sir George Horner was seised in Fee of the Manor of Dowling, to which the Advowson was appendant, and that being so seised he presented one Harding, and then granted the next Avoidance to the Plaintiff. That the Church became void by the Death of the said Harding, and that now it belonged to him to present. Traverse shall not be upon a Traverse, &c. Mod. Rep. 230.

The Bishop pleads, that he claims nothing, but as Ordinary; and the Incumbent pleads, that at the Time of the bringing of this Writ, the Church was full by the Collation of the Bishop upon a Lapse.

The Plaintiff replies, That Sir George Horner being seised in Fee of the said Manor of Dowling, to which the Advowson of the Church was appendant, did tali Die & anno apud, &c. present him as Clerk, absque hoc that the Church was full by Collation.

The Defendant rejoins, Protestando that the Church was full tali die; and for Plea saith, that it was full upon the Collation of the Bishop, absque hoc that Sir George Horner did tali die & anno, &c. present the Plaintiff as his Clerk, and so traverseth the Inducement which the Plaintiff had made to his Traverse; and to this, the Plaintiff demurred.

And Serjeant George Strode took Three Exceptions to this Rejoinder. Ex parte Quer.

1. That when the Defendant pleads a Matter in Bar, and the Plaintiff hath taken a Traverse upon that, the Defendant should then take Issue upon that Traverse, and so have maintained

Vaugh. 62. 1 Sand. 21, 22. tained his Bar, from which he had departed here by traverſing another Matter.

In a Quare Impedit the Plaintiff declares, that Sir Thomas Chicheley granted an Advowſon to one Eaſt, and another in Fee, to the Uſe of the Wife of the Plaintiff for her Jointure, and that ſhe ought to preſent.

The Defendant pleads, that he is Parſon imparſonee ex præſentatione Regis, for that Sir Thomas Chicheley died ſeiſed as aforeſaid of the Manor and Advowſon held in Capite by Knights Service, which deſcended to his Son an Infant, and by Office found of the Tenure and Deſcent the King was ſeiſed, and preſented him, abſque hoc that Sir Thomas granted to Eaſt.

The Plaintiff replies, Non habetur tale Recordum de inquiſitione; and upon Demurrer it was held, that this Traverſe of the Inquiſition was not good; for there ſhall not be a Traverſe upon a Traverſe, but where the Traverſe in the Bar is material to the Title of the Plaintiff; and in ſuch Caſe he is bound up to it, Cro. Car. 104, 105.

Hob. 104. 1 Inſt. 282. b. Vaugh. 62.

Antea. Yelv. 122. 2. In his Traverſe he hath made the Time Parcel of the Iſſue, viz. abſque hoc that tali die & anno præſentavit, whereas it ſhould have been modo & forma only, and ſo is the Caſe of Lane *and* Alexander, where the Defendant intituled himſelf by Copy of Court Roll, 44 Eliz. The Plaintiff replies, that a Copy was granted to him 1 Junii, 43 Eliz. The Defendant maintained his Bar, and traverſeth the Grant 1 Junii modo & forma; and upon a Demurrer it was ſaid, that the Rejoinder was not good, becauſe the Day and Year of granting of the Copy was not material, if it was granted before the Defendant had his Copy; and ſo the Traverſe ought to have been, abſque hoc that the Queen granted modo & forma.

2 Cro. 202.

1 Sand. 14. 2 Sand. 295. Cro. Car. 501 But it was adjudged, That the Day ought not to be made Parcel of the Iſſue, and the Traverſing of it when it ought not ſo to be, makes it Subſtance and not Form, ſo as to be aided by the Statute of 27 Eliz.

3. As the Defendant hath joined, they can never come to an Iſſue; for he concludes his Traverſe, Et hoc Parat eſt verificare, unde petit Judicium; whereas he ſhould have concluded to the Country.

Ex parte Def. Barton, Serjeant; admitting the Pleadings are not good, yet if the Plaintiff's Count is ſo likewiſe, he cannot have Judgment; and that it was ſo, he ſaid, appears in that the Plaintiff had not ſet forth a ſufficient Title; for he hath alledged that Sir George Horner was ſeiſed in Fee, and preſented the Plaintiff, who was inſtituted and

and indued, but doth not say that the Presentation was tempore Pacis, and therefore it shall be presumed most strongly against himself to be tempore Belli, and a Presentation must be laid tempore Pacis, and so is the Writ of Assise of Darrein Presentment, F. N. B. 31. Old Nat. Br. 25. 1 Inst. 249.

The Court held that the Pleadings were not good, and that the Count was good; for 'tis true, if a Man count that he and his Ancestors were seised in Fee of an Advowson, but declares of no Presentation made by him or them; or if he declare of a Presentation without an Estate, in both Cases it is naught, and good Cause of Demurrer; but here the Count is both of an Estate and a Presentation. And this Difference was taken, if a Man gets a Fee by Presentation, which is his Title, he must alledge it to be tempore Pacis; but if it be in Pursance of a Right, as if an Advowson be appendant to a Manor, and he who hath Right to the Manor presents, such Presentation is good in Time of War; and so Judgment was given for the Plaintiff. Vaugh. 57 Hob. 101.

Stevens *versus* Austin.

ADjudged, That if a Man hath Common for a certain Number of Cattle belonging to a Yard-Land, he need not say Levant upon the Yard-Land; sed aliter, if it were for a Common sans Number.

The Master, Warden and Company of Ironmongers, *versus* Naylor *and others*, Defendants. *In B. R.*

IN Trespass, the Jury found a special Verdict; they find several Acts of Parliament, Viz. 14 Car. 2 cap. 10. 15 Car. 2. cap. 13. and another Act, for the better Direction of the collecting of the Duty arising by Hearth-Money by Officers to be appointed by the King; and this was the Act of 16 Car. 2. cap. 3. which provides, That if the Party refuses to pay the Duty by the Space of an Hour, that then the Officers with the Constable may distrain. Jones 85. 1 Ventris 311.

They find that the Company was seised in Fee of five Messuages, in which were 35 Fire-Hearths in the Month of April, 1673. and that the Company did never finish these Messuages, and that from the Time of the Building they stood all void and unoccupied by any Tenant or Tenants whatsoever.

Then they find that the Collectors were lawfully authorised, and that such a Day they demanded the Duty for the Fire-Hearths in each of the said Messuages, which they also demanded of the Company, and which they refused to pay, and thereupon they took the Distress, and kept it till the Company paid the said Duty, and so make a general Conclusion, &c.

The Question was, Whether the Owner of a new House uninhabited from the Time of the Building thereof ought to pay this Duty during all that Time?

Mr. Pollexfen and Mr. Sympson argued, that they shall not be chargeable with this Duty; their general Reason was, because no Duty should arise to the King without some Benefit to the Subject.

And as to that it was said, that in this Case both the Revenue of the Crown and the Property of the Subject are concerned; from which, as from a Root, all these Impositions arise to sustain the publick Charge. And therefore,

It hath been the Way of Judges in the Interpretations of Statutes, not only to consider the Benefit of the Crown, but to regard what is convenient for the Subject.

There are Two Reasons for Impositions:

1. Such as are Customs, Viz. Tunnage and Poundage, and private Tolls, which come in lieu of other Things, and so are quid pro quo.

2. Subsidies or Grants from the People, which naturally arise in some Proportion from a Benefit to the Subject.

And under the last of these Reasons falls the present Duty given by the Act of 14 Car. only to proportion the Revenue to the publick Charge of the Crown; and therefore 'tis not to be thought that the Parliament ever intended a Duty to the King where the Subject had no Benefit, for ex nihilo nihil fit; and how can it be thought that a Duty should be paid before the Subject hath any Rent, which is the Mother of the Duty; for if a Man expends 1000 l. in Building, which is all he is worth, and the Houses should happen not to be let, how can he then raise such a Sum as must be paid to the King? And 'tis an Objection of no Weight to say, if this Duty must not be paid 'till the Houses are let, then the Revenue of the King depends upon a Contingency; because all Duties which come to the Crown do depend upon such.

The next Thing to be considered is the Act it self, and as to that,

1. It

1. It must be taken as an Act which gives a new Duty to the Crown, and thereupon such Construction ought to be made, that the Subjects Estate be not charged further than the Words will bear; and for that Reason it is to be taken in an ordinary Sense, and not to be strained, though it had been in the Case of an old Duty; and for that, the *Lord Anderson's Case is a good Authority, viz. The Statute of 33 H. 8. cap. 30. makes all Manors (which descend to any Heir whose Ancestor was indebted to the King by Judgment, Recognisance, Obligation or other Specialty) chargeable for Payment of the Debt. Tenant in Tail is bound in a Recognizance to S. who is attainted; then Tenant in Tail dies, and his Issue aliens bona fide, the King cannot extend the Lands so sold, because the Act shall not be construed to mean all Recognizances for the King's Debts, though the Words are general enough; and though 'tis not said which Way the Debts shall come to the King, either by Forfeiture, Attainder, &c. yet they shall be taken in an ordinary Sense, viz. such Debts as were due to the King originally; for which Reason it has been always held, where an Act gives any Thing to the King and lays a Charge upon the Subject, in such Case it ought to have a moderate Construction. * 7 Co. 21.

And that this Duty is a Gift, cannot be denied, for 'tis called so in the very Act, therefore such ought the Construction to be, and the rather because it is more for the King's Honour it should be so; and both in this Case, as well as in Constructions of his Grants, the Law hath more Regard for his Honour than for his Profit.

2. This being so called, a Duty or Tax by the very Words of the Act, doth in the natural Sense import a Proportion out of that in which the Subject hath a Benefit; and it will be scarce found that there hath been a general Tax given to the King, where the Subject has rather received a Loss than any Profit out of the Thing tax'd, because it would be very hard to pay where a Man cannot receive.

In the Case of Tonnage and Poundage, Provision is made that the Party shall have Allowance if the Goods be lost by Piracy; which was mentioned, to shew how unlikely it was that the Parliament should intend a Duty where the Subject had a Loss.

Ever since the making the Statute of 43 Eliz. cap. 2. Houses that lay void and untenanted have neither paid to Church or Poor, which also shews how the Usage hath been in Cases almost of the like Nature.

The next Thing considered, were the Clauses in this Act of 14 Car. 2. cap. 10.

1. The firſt Clauſe gives a Duty, Viz. That every Chimney and Stove ſhall pay 2 s.

2. The next Clauſe is to bring this Duty into a Way of Charge, Viz. That every Owner or Occupier ſhall give unto the Conſtable an Accompt of the Number of Hearths in Writing, and the Conſtables to tranſmit ſuch Accompts to the Seſſions, there to be enrolled by the Clerk of the Peace, and a Duplicate to be ſent into the Exchequer.

From which it is to be obſerved, that where Mention is made of bringing this Duty into a Charge, both Owners and Occupiers are named, but the Owner is not named in any Place where the Payment of the Duty is mentioned, but the Occupier only; ſo that from the very Intent and Reaſon of the Act he cannot be chargeable.

The Accompt thus tranſmitted is to charge the Inheritance, and therefore it concerns the Owner to look after the Charge; but for empty Houſes he cannot be charged, becauſe the Act takes no Notice of them in the Clauſe of Payment, but are purpoſely omitted, that being laid on the Occupier, and this appears by the Proviſo which is ſtrongly penned for the Subject.

Viz. Provided that the Payments and Duties hereby charged, ſhall be charged only upon the Occupier for the Time being, *&c.* and not on the Landlord who lett and demiſed the ſame; ſo that by the Body of the Act every Houſe is charged, which being general might have given ſome Colour to charge the Owner, but by the Proviſo the Payment is reſtrained to the Occupier, and if there be no ſuch, there ſhall be no Payment.

It was ſaid, that it cannot be inſiſted upon that an Owner is an Occupier, becauſe the legal Acceptance of the Word Occupation doth only intend an actual Poſſeſſion, and not a Poſſeſſion in Law; and ſuch is the Meaning of the Statute, by charging the Occupier for the Time being.

If therefore the Proviſo extends to Caſes where Tenants run away and pay no Rent, (as it certainly doth) becauſe there is no Occupier then in being; what Difference can there be between that and this Caſe, where the Landlord in both hath no Rent? For if he ſhall not pay where he cannot receive Rent, why ſhould he pay where he hath none to receive?

And that this was the Meaning of the Parliament, may further appear by a Clauſe in the Act of 16 Car. 2. cap. 3. made for collecting this Duty by Officers appointed by the King, which doth not inlarge the former Statutes, and by which 'tis enacted, That if any Occupier ſhall leave his Houſe before any of the half-yearly Feaſts, whereon this Duty is appointed to be paid, that

that the next Occupier ſhall be chargeable with the ſame for the ſaid Half-year.

Which Clauſe had been altogether vain and of no Uſe, if empty Houſes had been chargeable with this Duty; for to what Purpoſe was it to charge a ſucceeding Occupier, when the Houſe it ſelf, though untenanted, was chargeable before?

In this Act alſo, which ſupplies the Defects of the former, this Duty is made payable unto the Officer upon Demand at the Houſe where the ſame ſhall ariſe and grow due, and that in Caſe of Refuſal by the Space of an Hour, the Officer may diſtrein; which ſhews a Demand muſt be where there may be a Refuſal, and no Refuſal can be where there is no Occupier.

There is alſo another Clauſe which mentions both Owner and Occupier in this Act, and which ſaith, That no Proprietor, Owner, or Occupier, ſhall be moleſted or charged, unleſs within Two Years after the Duty accrewed; ſo that where-ever a Charge is laid, or an Eaſe is given to the Subject, the Word Occupier, and ſometimes both Occupier and Owner, promiſcuouſly are uſed; but where a Payment is to be made, the Owner is never mentioned, and if ſo, nothing ſhall be intended within either of the Statutes, to enlarge this Duty upon the Subject, beyond the Words and plain Meaning thereof.

2. There is another Point in this Caſe, which concerns the King and all the People of England; that is, whether the Defendant here can be charged with a Diſtreſs (ſuppoſing this Duty is to be paid to the King) before any Account of theſe Hearths is tranſmitted into the Exchequer, which firſt ought to be done; or otherwiſe the Conſequence will be, that the Officer may demand and take as much as he will at his Pleaſure, and the King may be likewiſe prejudiced in his Revenue; for as the Collector may have from the Subject more than he ought, and more than he is empowered to take by the Law, ſo he may pay the King leſs.

The Act directs, That an Account ſhall be taken by the Officers, and examined by the Conſtables, then to be tranſmitted to the Seſſions, there to be enrolled, and from thence ſent into the Exchequer; now what Occaſion was there of all this Solemnity, if that the King was entituled to a Diſtreſs upon a bare Refuſal?

This being a Rent-Charge upon a Man's Inheritance, the King ſhall not be entituled to it but by Matter of Record; for he cannot take or part with any Thing, neither can he have any Eſtate or Profit rendered him out of another Man's Eſtate, but by Matter of Record; ſo that it ſeems by the Act, that this Accompt is neceſſary to be tranſmitted into the Exchequer; and that

that the King is not entituled to a Diſtreſs for this Duty until that be actually done, which is not only Matter of Information to the Crown, but in ſome Meaſure intitles him to it, becauſe there is a Penalty of five Pounds laid upon the Officer, who ſhall neglect to bring in ſuch Accompt, which ſhews that the Subject ought not to be charged before; for which Reaſons Judgment was prayed for the Plaintiff.

Ex parte Def.

But on the other Side it was argued by Mr. Holt and the Attorney General, that empty Houſes ſhould pay this Duty: For the Attorney General ſaid, that the Words in the Act were ſo expreſs, that he was of Opinion that the very Reading of them would clear the Point in Queſtion.

In their Arguments, Two Things were conſidered upon the Statute of 14 Car. 2.

1. Firſt, the General Clauſe, which gives the Duty in the Body of the Act.

2. The Diſcharge in the Proviſo.

And if this be in the Body of the Act, and not excepted in the Proviſo, then the Duty is to be paid; And as to that, it was ſaid that this Duty was given in general Words, by which it appears, that there was a Deſign and Intent to charge empty Houſes, for every Dwelling-Houſe, Edifice or Houſe whatſoever, is to pay this Duty; and that if every Houſe, why not an empty Houſe?

'Eis true, a Dwelling-Houſe is not a Houſe wherein there hath not been an Inhabitant, but wherein ſome body doth actually live; and if a Man furniſhes a Houſe very well, if 'tis not inhabited, it is notwithſtanding an empty Houſe, and ſuch a Houſe as to ſome Purpoſes in the Law is not a Dwelling-Houſe; for 'tis not a Manſion-Houſe, ſo as to make it Burglary for the Breaking of it open.

By the Second Clauſe, Every Owner or Occupier is to ſubſcribe the Account to be ſent into the *Exchequer*; by which it appears, that thoſe Words, Owner and Occupier, are not there uſed in a different Senſe, for if the Occupier were only liable, the Owner need not look after the Signing the Accompt of every Hearth.

The Third Clauſe takes notice, That if it ſhould happen there be no Occupier, then the Officer may go into the empty Houſe to examine if the Account given him be true; now if an Account is to be taken of ſuch Houſes as are charged by this Act, and an Account is directed to be taken of empty Houſes, then ſuch empty Houſes muſt be charged; and this ſeemed to them to be

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the Intent and Meaning of the Parliament, for there being a Return to be made of empty Houses, if such had not been intended to be charged, they would have directed a Return also to have been made of the Non-inhabitancy.

And therefore they thought that something more than an Occupier was here meant, for otherwise the Word Owner had not been put in; the Meaning of which must be, That Dwelling-houses come within the Charge of Occupiers, and empty Houses within the Charge of the Owners.

Then as to the Proviso, That the Duty hereby arising shall be charged only upon the Occupiers and Dwellers of such Houses, their Executors and Administrators, that can in no sort extend to discharge an empty House, because 'tis not the subject Matter of the Proviso; for the Design and Purpose of it was not to discharge the Duty, but to transfer the Charge upon the Tenant where the House was inhabited; for if a contrary Construction should be made, then no Duty should be paid at all by the Owner himself, if he should live in his own House.

In the Case of a Modus decimandi, 'tis payable by the Occupier and Possessor of the House, and the Landlord is never charged but where there is no Occupier.

As to the Objection, That 'tis hard to pay a Duty where a Man has no Profit; it was answered, That the Act took Care that Men should not stop up their Chimnies when once made, and that this Duty was paid for many Chimnies which were never used; and what Profit can a Man have of a Chimney he never useth? If there had been an Act, that so much should be paid for every Window, 'tis all one whether it had been for Profit or Pleasure, or whether the Window had been used or not; and there is as much Reason that a Man should pay for Houses never inhabited, as for such as have been inhabited and are afterwards without Tenants.

This Act ought therefore to receive a favourable Construction; the Preamble whereof mentions, that it was for the encreasing of the King's Revenue, which is pro bono publico, and which is for the Peace and Prosperity of the Nation, and the Protection of every single Person therein; and though a particular Inconvenience may follow, the Party ought to submit. When a Man builds a House, he proposes a Profit; and 'tis not fit the King's Duty should be contingent and depend, till he has provided himself of a Tenant.

Object. As to the other Objection that was much relied on, Viz. where the Act speaks of an Accompt to be given, it mentions both Owner and Occupier; but where it directs the Payment of the

the Duty the Occupier only is named, by which it was inferred that he alone was chargeable.

Answ. In 16 Car. 2. cap. 3. Owner, Proprietor and Occupier, are used promiscuously, wherein it is provided, that they shall not be charged unless within two Years after the Duty accrued; now if the Owner was not chargeable, why is he mentioned there?

As to the second Point, they conceived that the Duty being payable to the King, he had a Remedy by Distress before the Accompt was certified into the Exchequer; for the Return was to inform the King what Advantage he maketh of his Revenue, and no Process issued upon it; besides the Act vests the Duty in him from Lady-day, 1662. And by reason of that he may distrain. The King hath no Benefit by returning of the Account, that being only intended to prevent his being cheated, so that 'tis not to entitle but to inform him; 'tis only to return a just and true Account; not but that it may be levied, and the King entituled before; and 'tis no Inconvenience to the Subject, if there be no such Account returned, for if the Officer distrain for more Hearths than in Truth there are, the Subject has a proper Remedy against him.

The King suffers, when Returns are not made of such Duties as he ought to have for the Support of his Dignity; and because he is liable to be defrauded in the Managing of his Duty, is it reasonable that he should lose all?

As to what was said of the King's taking by Matter of Record; 'tis true, if he divest an Inheritance, as in case of Attainder, it must be by Record; but here the very Duty is given to him by the Act it self, which makes it a different Case.

If the King should be seised in Fee of a great Waste, which happens to be improved by his Tenants, and thereby Tythes become due, it may be as well said, that he shall have no Tythes without Record, as to say he shall have no Hearth-Money for Houses newly erected, whereby his Revenue is increased. For which Reasons Judgment was prayed for the Defendant, and upon the Second Argument Judgment was given accordingly for him, That empty Houses are subject and liable to this Duty.

Curia.

Astry

Aſtry *verſus* Ballard.

IN an Action of Trover and Converſion for the taking of Coals, upon Not-Guilty pleaded, the Jury found a ſpecial Verdict. The Caſe was thus:

Grants muſt be taken according to common Intendment.

Viz. That one J. R. was ſeiſed in Fee of the Manor of Weſterly, and being ſo ſeiſed, did demiſe all the Meſſuages, Lands, Tenements and Hereditaments that he had in the ſaid Manor for a Term of Years to N. R. in which Demiſe there was a Recital of a Grant of the ſaid Manor, Meſſuages, Lands, Tenements, Commons, and Mines, but in the Leaſe it ſelf to R. the Word Mines was left out. Afterwards the Reverſion was ſold to the Plaintiff Aſtry, and his Heirs by Deed enrolled; and at the Time of this Demiſe there were certain Mines of Coals open, and others which were not then open; and the Coals for which this Action of Trover was brought, were digged by the Leſſee in thoſe Mines which were not open at the Time of the Leaſe; and whether he had Power ſo to do, was the Queſtion. Jones 71. 2 Levinz. 185.

It was ſaid, That when a Man is ſeiſed of Lands wherein there are Mines open, and others not open, and a Leaſe is made of theſe Lands in which the Mines are mentioned; 'tis no new Doctrine to ſay, that the cloſe Mines ſhall not paſs. Men's Grants muſt be taken according to uſual and common Intendment, and when Words may be ſatisfied, they ſhall not be ſtrained farther than they are generally uſed, for no violent Conſtruction ſhall be made to prejudice a Man's Inheritance contrary to the plain Meaning of the Words. Antea.

A Mine is not properly ſo called 'till it is opened, 'tis but a Vein of Coals before; and this was the Opinion of my Lord Coke in Point, in his Firſt Inſt. 54 b. Where he tells us, that if a Man demiſes Lands and Mines, ſome being opened and others not, the Leſſee may uſe the Mines opened, but hath no Power to dig the unopened Mines; and of this Opinion was the whole Court: And Juſtice Twiſden ſaid, That he knew no Reaſon why my Lord Coke's ſingle Opinion ſhould not be as good an Authority as Fitzherbert in his Nat. Br. or the Doctor and Student. 5 Co. 12. Sanders Caſe. Roll. Abr. 2 Part 816.

Ipſley *verſus* Turk.

IN a Writ of Error upon a Judgment in an inferior Court, the Error aſſigned was, That the Mayor, who was Judge of the Court, did not receive the Sacrament at any Pariſh Church, What is admitted in Pleading.

Shall not be assigned for Error. Jones 81. 2 Levinz 184.

Church, nor file any Certificate, so that he was not Mayor; and Judgment being given against the Defendant before him, it was therefore Coram non Judice, like the Case of Hatch and Nichols, Roll. Abr. 1 Part tit. Error 761. Where, upon a Writ of Error brought upon a Judgment in an Inferior Court, the Error assigned was, that the Style of the Court was Curia tent' coram J.S. Seneschallo, who was not Steward, and that was held to be an Error in Fact.

But on the other Side it was insisted, that this was not Error, because the Acts of the Mayor should not be void as to Strangers. The Statute of 25 Car. 2. cap. 2. for preventing of Dangers which may happen from Popish Recusants, disables the Party who is not qualified according to the Act to hold an Office, and if he execute the same afterwards, upon Complaint made, and Conviction, he shall forfeit 500 l. so that as to himself, whatever he doth in his Office is void; but it was never the Intent of the Act to work a Mischief or Wrong to Strangers, for the Law favours what is done by one in reputed Authority; as if a Bishop be created, who upon a Presentation made admits a Parson to a Benefice, or collates by Lapse, the former Bishop not being deprived or removed; such Acts are good, and not to be avoided, Cro. Eliz. 699.

Cro. Car. 97. 2 Cro. 260.

But admitting it to be an Error, it cannot now be assigned for such, because the Parties in Pleading have allowed the Proceedings to be good upon Record, and there is Judgment against the Defendant; but if he had been taken upon that Judgment, he might have brought an Action of false Imprisonment, 2 Cro. 359. Cro. Eliz. 320.

Wild, Justice: You shall not assign that for Error which you might have pleaded, especially having admitted it by Pleading; and one Musgrave's Case was cited, which was, That there is an Act of Parliament which lays a Tax upon all Law-Proceedings, and makes them void, if the King's Duty be not paid; and it was adjudged, That if the Duty was not paid, but admitted in Pleading, you shall not afterwards alledge what before was admitted, viz. That the Duty was not paid.

Upon a Writ of Error in Parliament it cannot be assigned for Error, that the Chief Justice of the King's-Bench had not taken this Oath; the same might be also of a Writ of Error in the Exchequer-Chamber, for an Error in Fact cannot be there assigned; but at the last the Judgment was reversed: See the Reasons thereof by the Chief Justice Jones in his Reports, folio 81.

Sid. 253.

Hig-

Higginſon *verſus* Martin. *In* C. B.

IN an Action of Treſpaſs and falſe Impriſonment, the Defendant juſtifies by Proceſs iſſuing out of the Court of Warwick, upon a Judgment obtained there, and ſets forth, that there was a Plaint there entered in placito tranſgreſſionis, to which the Defendant appeared, ſuper quo taliter proceſſum fuit, that Judgment was given againſt him, upon which he was taken and impriſoned.

If Cauſe of Action doth not ariſe within the Juriſdiction, tho' Judgment is given below, an Action will lie here.

The Plaintiff replies, That the Cauſe of Action did not ariſe within the Juriſdiction of that Court.

The Defendant rejoins, That the Plaintiff is now eſtopped to ſay ſo, for that the Declaration in the Inferior Court againſt the now Plaintiff, did alledge the Cauſe of Action to be infra Juriſdictionem of the Court, to which he pleaded, and Judgment was given againſt him: The Plaintiff demurs.

And Newdigate Serjeant took Exceptions to the Plea.

1. 'Tis ſaid, a Plaint was entered in placito tranſgreſſionis, but 'tis not ſaid what kind of Treſpaſs it was, whether a clauſum fregit, or other Treſpaſs. Ex parte Quer.

2. 'Tis ſaid, that the Defendant appeared ſuper quo taliter proceſſum fuit, that Judgment was given for the Plaintiff, and no mention was made of any Declaration; and the Pleading taliter proceſſum eſt in an Inferior Court, is not good. Antea.

3. The Juſtification is ill, becauſe the Inferior Court had no Juriſdiction, and ſo the Proceedings are coram non Judice; for the Plaintiff in his Replication ſaith, That the Treſpaſs for which the Recovery was had in the Court of Warwick, was done at a Place out of the Juriſdiction of the Court, which the Defendant hath admitted, by relying on his Plea by Way of Eſtoppel. Moor 422. Latch. 180. Cro. Jac. 184.

4. It did not appear by what Authority the Court at Warwick was held, whether by Grant or Preſcription.

Theſe Exceptions were anſwered by Serjeant Hopkins; and Firſt, he ſaid, That the Plaintiff there ſets forth, that levavit quandam querelam in placito tranſgreſſionis, which was well enough. Ex parte Def.

Secondly, taliter proceſſum fuit is the ſhorter and better Way of Pleading, and therefore in a Scire facias nothing is recited but the Judgment; tis true, in a Writ of Error the whole Record muſt be ſet out, but that is not neceſſary here.

Thirdly, 'tis too late now to question the Jurisdiction of the Inferior Court, after the Party hath admitted it below; he ought first to have pleaded to the Jurisdiction, but now is estopped by his own Admittance there; and since Judgment is given upon it, 'tis not now to be questioned; but however, this being in the Case of an Officer, if it was out of the Jurisdiction he is bound to execute the Process of the Court, and so this is a good Excuse for him, Dyer 61. 10 Co. 77.

But let the Pleadings be good or bad, if the Declaration here be ill, the Plaintiff cannot have Judgment; and that it was so, he said that the Writ alledged an Imprisonment generally, but the Count an Imprisonment donec he paid 5 l. 10 s which is variant, and the Prothonotaries said, that the Writ used always to mention donec, &c.

Curia. But the Court were all of Opinion, that the Count was well enough, for there was no Matter therein contained which was not in the Writ; the Imprisonment was the Gist of the Action, and the donec, &c. might have been given in Evidence, because 'tis only an Aggravation and a Consequence of the Imprisonment, so that the Count is not larger, but more particular than the Writ: And as to the Two first Exceptions, the Court was also of Opinion, that there was no Difficulty in them, or in the last Exception, but thought the Plea was well enough as to those. And they also agreed, that the Officer in this Case was to be discharged; for though the Process be erroneous, yet he is to obey, and not to examine, 2 Cro. 3. Weaver *versus* Clifford: The great Doubt in this Case was upon the Third Exception, as to the Point of Jurisdiction, and whether the other Defendant, who was the Plaintiff below, should be likewise discharged, was the Question.

Sid. 151. Latch. 181.

Con' Lut. 935, 938, 1568, 1569, 1571. 2. And as to that, the Chief Justice, and Wyndham Justice, were of Opinion, That this was no good Justification as to the Plaintiff below; for if the Cause of Action did arise without the Jurisdiction, of which he is bound to take Notice, the Proceedings quaod him, are all coram non Judice, and he cannot justifie the serving of any Process; so that if the Trespass was done out of the Jurisdiction of the Court, the Defendant below may bring an Action against the Plaintiff, and is not concluded here by the Proceedings there, but may alledge the Cause of Action to arise out of the Jurisdiction; and as to his being estopped by admitting of the Jurisdiction below, that cannot be, because an Admittance cannot give the Court a Jurisdiction where it had none originally, and so he said it was resolved in one Squib's Case, in a special Verdict.

1 Ven. 369.

He

He who ſues in an Inferior Court, is bound at his Peril to take Notice of the Bounds and Limits of that Juriſdiction; and if the Party after a Verdict below prays a Prohibition, and alledges that the Court had no Juriſdiction, a Prohibition ſhall be granted; and 'tis no Eſtoppel that he did not take Advantage of it before, 5 Roll. Abr. 145. 1 Ven. 88. Con' Lut. 1567.

But Juſtice Atkins and Scroggs were of another Opinion; they agreed, That if an Action be brought in an inferior Court, if it be not ſaid to be infra Juriſdictionem Curiæ, they would never preſume it to be ſo, but rather to be without, if not alledged to be within the Juriſdiction, and here in the Plea 'tis not ſhewn at all; ſo that as the Caſe ſtands upon the Plea, the Proceedings are coram non Judice, and there is no legal Authority to warrant them, and by Conſequence the Officer is no more to be excuſed than the Party, becauſe alſo 'tis in the Caſe of a particular Juriſdiction: And ſo it hath been adjudged upon an Eſcape brought againſt an Officer of an Inferior Court, wherein the Plaintiff declared, That he had brought an Action upon a Bond againſt S. in the Court of Kingſton, and that he had Judgment and Execution, and the Defendant ſuffered him to eſcape; this Declaration did not charge the Defendant, becauſe the Bond was not alledged to be made infra Juriſdictionem Curiæ; for though ſuch an Action is tranſitory in its Nature, yet the Proceedings in an inferior Court upon it are coram non Judice, if it doth not appear to be infra Juriſdictionem, 1 Roll. Abr. 809. though in the Caſe of a general Juriſdiction it might be otherwiſe.

But here the Rejoinder doth help the Plea; for the Plaintiff having replied that the Treſpaſs was committed out of the Juriſdiction, and the Defendant having rejoined that he had alledged in his Declaration below that the Treſpaſs was done within the Juriſdiction, 'tis now all one Plea, and the Plaintiff hath confeſſed it by his Demurrer; ſo that in Regard it was alledged below and admitted there, 'tis a good Plea both for Officer and Party, and the Plaintiff cannot now take Advantage of it, but is concluded by his former Admittance, and it ſhall not be enquired now whether true or falſe. Lut. 935, 938, 1568.

And as to the taliter proceſſum fuit, they all held it well enough, and that there was no Neceſſity of ſetting out all the Proceedings here as in a Writ of Error. 2 Vent. 100. con'T. Jones, 129, 185. Ante 102.

And as to the laſt Exception, 'tis ſaid that the Borough of Warwick is antiquus Burgus, and that the Court is held there ſecundum Conſuetudinem, which is well enough.

Jones's

Jones's *Case*.

Common-Pleas cannot grant *Habeas Corpus* in Criminal Cases.

IT was moved for a Habeas Corpus for one Jones, who was committed to New-Prison by Warrant from a Justice of Peace, for refusing to discover who intrusted him with the keeping of the Keys of a Conventicle, and for that he had been instrumental to the Escape of the Preacher; he was asked by the Justice to give Security for his good Behaviour, which he also refused, and thereupon was committed.

The Chief Justice doubted that a Habeas Corpus could not be granted in this Case, because it was in a criminal Cause of which the Court of Common-Pleas hath no Jurisdiction, and that seemed to be the Opinion of my Lord Coke, 2 Inst. 55. where he saith, it lies for any Officer or Priviledged Person of the Court.

Vaugh. 157. 2 Inst. 53.

There are Three Sorts of Habeas Corpus in this Court; one is ad respondendum, which is for the Plaintiff who is a Suitor here against any Man in Prison, who is to be brought thereupon to the Bar, and remanded if he cannot give Sureties.

Mod. Rep. 235.

There is another Habeas Corpus for the Defendant ad faciend' & recipiend'; as to this, the same Jurisdiction is here as in the Court of King's Bench; if a Person be near the Town, by the Course of the Court he may be brought hither to be charged, and then the Habeas Corpus is returnable immediate; but if he be remote, it must then be returnable in the Court at a certain Day; these are the Habeas Corpus's which concern the Jurisdiction of this Court, and are incident thereunto.

There is another which concerns Priviledge, when the Party comes and subjects himself to the Court to be either bailed or discharged, as the Crime is for which he stands charged; and if he be priviledged, this Court may examine the Case, and do him Right; if a private Man be committed for a criminal Cause, we can examine the Matter, and send him back again. Before King James's Reign there was no Habeas Corpus, but recited a Priviledge, as in the Case of Priviledge for an Attorney; so that if this Court cannot remedy what the Party complains, 'tis in vain for the Subject to be put to the Trouble when he must be sent back again; neither can there be any Failure of Justice, because he may apply himself to a proper Court: And of the same Opinion were Wyndham and Scroggs.

But

But Justice Atkins was of another Opinion, for he could see no Reason why there should not be a Right to come to this Court as well as to the King's Bench.

And that Vaughan, Wild, and Archer, Justices, were of Opinion, that this Court may grant a Habeas Corpus in other Cases besides those of Priviledge.

Afterwards the Prisoner was brought to the Court upon this Habeas Corpus, but was remanded, because this Court would not take Sureties for his Good Behaviour: The Chief Justice said, That when he was not on the Bench, he would take Sureties as a Justice of Peace: And Monday, late Secondary, informed him, that Justice Wild, when he sat in this Court, did once take such Sureties as a Justice of Peace.

Anonymus.

IT was the Opionion of the Chief Justice North, that in a Replevin both Parties are Actors; for the one sues for Damages, and the other to have the Cattle, and there the Place is material; for if the Plaintiff alledges the Taking at A. and they were taken at B. the Defendant may plead Non cepit modo & forma, but then he can have no Return; for if he would have a Retorn' Habend', he must deny the Taking where the Plaintiff hath laid it, and alledge another Place in his Avowry. In *Replevin* both are Actors.

Sir Osborn Rands *versus* Tripp.

THE Plaintiff was a Tobacconist, and lived near Guild-Hall, London; he married the Daughter of the Defendant, who was an Alderman in Hull, and had 400 l. Portion with her; after the Marriage, the Defendant spoke merrily before Three Witnesses, That if his Son-in-Law would procure himself to be Knighted, so that his Daughter might be a Lady, he would then give him 2000 *l.* more, and would pay 1000 *l.* Part thereof presently upon such Knighthood, and the other 1000 *l.* within a Year after; (it being intended when the Plaintiff should by his Trade get an Estate sufficient to qualifie him for the Dignity of a Knight.) New Trial granted.

The Son-in-Law, without acquainting the Defendant, did about nine Months afterwards procure himself to be Knighted, and brought an Assumpsit for the 2000 l. which was tried before the Chief

Chief Justice North at Guildhall, and the Jury gave 1500 l. Damages.

And now Serjeant Maynard moved for a new Tryal upon the Affidavit of the Defendant, that he had found out material Witnesses since the Trial, and that such Witnesses as he had ready at the Trial could not get into Court, because of the great Tumult and Disorder there with a Multitude of People, by Reason whereof his Council could not be heard from the Noise, and when they offered to speak, were as often hissed.

The Chief Justice thought it was a hard Verdict, for he was not clearly satisfied that the Agreement was good, it being only for Words which were spoken by the old Man when he had but a weak Memory; and thereupon a new Trial was granted, because the Chief Justice thought it was fit so to be.

Basket *versus* Basket.

Disjunctive Condition, one Part is discharged by the Obligee, the other Part shall not be performed by the Obligor. Mod. Rep. 264.

DEBT upon a Bond, with a Condition to make an Assurance of an Annuity of 20 l. per Annum to the Plaintiff within six Months after the Death of M. B. and if he refuse when requested by the Plaintiff, then to pay 300 l. and if he fail in Payment thereof, the Bond to be forfeited.

The Defendant pleads, that all the Six Months he was a Prisoner at Morocco in Barbary, and that after his Return he requested the Plaintiff; and to this Plea the Defendant demurred.

And Serjeant George Strode maintained the Demurrer.

The Question was, Whether the Plaintiff, by neglecting to tender a Grant of the Annuity to the Defendant, hath not dispensed with the whole Condition? And he held that it was dispensed withal, and that no Request being made, the Bond could not be sued at the Common Law, and therefore the Replication was ill.

'Tis not so much a disjunctive Condition to do one Thing or another, but the last Clause is a Penalty to inforce the first; for seeing the Annuity is to be but 20 l. per Annum for a Life, and yet that 300 l. is to be paid in case that be not granted, this proves it to be only a Penalty, because Annuities at the highest Value are but at Eight Years Purchase, whereas this is Fifteen Years Purchase, so that the 300 l. could never be intended as a Recom-

Recompence for the Annuity; neither could the Defendant poſſibly ſave the Condition, becauſe the ſame Time is limited both for the Payment of the 300 l. and granting of the Annuity, viz. within Six Months; and the Plaintiff hath to the utmoſt Time to requeſt the executing the Grant, and therefore the other cannot pay the Money before. 1 Sand. 287.

But taking the Caſe to be, that this is a Diſjunctive Condition; yet ſince Conditions are always made in Favour of the Obligor, the Power of Election, even in ſuch Caſes, is left wholly in him; but according to ſuch Conſtructions as would be made for the Plaintiff, the Election is gone from the Defendant, and left in the Obligee; for if he do not requeſt the Annuity, then the 300 l. is to be paid, and this is directly againſt the Rules of Diſjunctive Conditions; and the Caſe of * Greeningham and Ewre is expreſs in Point, where the Condition of a Bond was, That if the Obligor delivered to the Plaintiff Three Bonds by ſuch a Day, or gave him ſuch a Releaſe of them, as the Plaintiff's Council ſhould adviſe before the ſaid Day, that then, &c. 5 Co. 22. a. Wright *and* Bull, Poſtea. * Cro. Eliz. 396, 539. 1 Roll. Abr. 447. Poph. 98. Goldsb. 142.

The Defendant pleads nothing as to the Delivery of the Bonds, but ſaith, that the Plaintiff's Council adviſed no Releaſe; and upon a Demurrer this was adjudged for the Defendant, becauſe in all Obligations with a Penalty the Election is always in the Obligor; and this being a Diſjunctive Condition, each Part is likewiſe in his Election; for if the Obligee ſhould not tender the Releaſe, the other is not bound to deliver the Bonds; and if he ſhould tender it, then the Obligor may either deliver the Bonds or execute the Releaſe, which he pleaſeth, 4 H. 7. 4.

If a Man enter into Bond with Condition to marry Jane by ſuch a Day, and the Obligee marry her before the Day, the Condition is ſaved; but 'tis otherwiſe if a Stranger had married her before that Day: The Act of God, and the Act of the Obligee, in many Caſes diſpenſe with Conditions, as 5 Co. 21. b. if a Parſon be bound in a Bond conditioned to reſign his Church to A. in Conſideration of a certain Penſion agreed on, and the Parſon refuſes; the Court was of Opinion, That he need not reſign till he was ſure of his Penſion by Deed, which they held ought to be firſt tendred unto him. 1 Roll. Abr. 455. *14 Hen. 4. 19. a.*

So a Man covenants to grant ſuch an Eſtate to his Wife, or to leave her worth ſo much Money if ſhe ſurvive him; if ſhe dies before him the Condition is not broken, though he did not make ſuch Grant: In the Caſe of Warren *and* White it was lately adjudged in the King's Bench, that where Warren was indebted to Warner, and White became bound with him to pay the Money before the 25th Day of December then next following; *Laughter's Caſe 5 Co.* T. Jones 95.

but if he did not pay it, that then Warren should appear the next Hillary-Term following to Warner's Action; Warren dies after the 25th of December, but before the Term; and it was held, that the Bond was not forfeited, because the Obligor had Election to do either the one or the other, and the Performance of the one becoming impossible by the Act of God, the Obligation was saved.

1 Rol. Abr. 451.

Moor 645.

If the Case of Moor *and* Moorcomb, Cro. Eliz. 864. should be objected, where the Condition of the Bond was, That the Defendant should deliver to the Plaintiff a Ship before such a Feast, or in Default thereof pay at the same Feast such a Sum as a Third Person therein named should adjudge; which Third Person appointed no Sum to be paid, and yet there it was adjudged for the Plaintiff that it did not dispense with the whole Condition.

Which Case he agreed to be Law, because there the Valuation and Worth of the Ship and the Money to be paid was by the Appointment of a Stranger; and the Condition being for the Benefit of the Defendant, he is to procure the Stranger to make an Appointment what Sum should be paid, or to deliver the Goods, otherwise the Bond is forfeited, and he hath expressly agreed to do the one or the other.

But this is not like the Case at the Bar, where 'tis not a Stranger, but the Obligee himself that must procure the Conveyance; for 'tis to be advised by his Council, and to be done at his Costs; and therefore in * Lamb's Case it was held, That if a Man be bound to give such a Release before such a Day as the Judge of the Admiralty shall direct; there 'tis no Plea to say that he appointed none, for the Judge being a Stranger to the Condition, the Defendant is to apply himself to him, having undertaken to perform it at his Peril, which is the same Resolution with Moor's Case in Crook.

* 5 Co. 23.

1 Roll. Abr. 452. lit. L. placito 6.

So that he took it for a Rule in all Cases, that where the Act of God, or of the Obligee, discharges the Obligor from one Part of a Disjunctive Obligation, that the Law discharges him of the other; and therefore prayed Judgment for the Defendant, Dyer 361.

Ex parte Quer.

Serjeant Pemberton contra. It appears that one Thing or the other was to be done in this Case; for if the Plaintiff demanded and tendred an Annuity, the Defendant was to seal it; and if he did not tender it, then likewise the Defendant was to do something, viz to pay 300 l. So that the Plaintiff was either to have the Annuity or the Money.

He agreed, That where the Obligor hath the Election, if in such Case the Obligee shall wilfully determine it, that the Bond is thereby discharged.

But

But if a Stranger take away the Election, 'tis no Discharge, for in such Case the other Part is to be performed.

In this Case the Plaintiff hath done no wilful Act to determine the Defendant's Election; but all which is pretended is, that he hath not done something necessary to be performed, which is, that he hath not made a Request.

But by his Omission thereof, the Defendant's Election is not taken away; for though no Request was made within the Six Months, yet the Defendant might have prepared a Grant of the Annuity himself, and have offered it to the Plaintiff within the Six Months, upon the last Part of the Day; and if he had thus set forth his Case, and alledged, That the Plaintiff made no Request, nor tendered him a Grant of the Annuity to seal; this had been a good Performance of the Condition, for he had done that which was the Substance, which though it was to be done at the Plaintiff's Charge, yet the Defendant might have brought an Action for so much Money by him laid to the Use of the other; and the Cases put in the principal Case in Moor 645. are expressly for the Plaintiff in this Case, where the Judgment was, That if there be a Statute with a Defeazance, to make such Conveyance as the Council of the Conusee shall direct, the Cognisor must prepare the Conveyance, if the other doth not; and there is a Case put, where a Thing was to be done at the Costs of the Plaintiff, yet the Defendant did it at his own Charge, which he recovered of the other.

North, Chief Justice, and the whole Court were of Opinion, That the Plea was good, because the Defendant had the Benefit of Election, and the Plaintiff not making the Request within the Six Months, had dispensed with one Part of the Condition, and the Law hath discharged the Defendant of the other Part; and they relied upon the Case of Grenningham and Ewre, which they held to be good Law, and an Authority express in the very Point. Judgment.

In this Case the Obligee was to do the first Act, Viz. To make the Request. Where the Condition is single, Concilium non dedit advisamentum is a good Plea to discharge the Defendant; so here the Condition is but single, as to the Defendant; for though it be Disjunctive, yet the Plaintiff hath taken away the Benefit of Election from the Obligor of doing the one, and therefore he shall be excused from doing the other.

The Pleading as alledged by the Council of the Plaintiff, would not have been a good Performance of the Condition; for if one be bound to convey as the Council of the other shall advise,

vise, and he makes the Conveyance himself, this is not such a Deed as was intended by the Parties, and so no Performance of the Condition.

But however the Defendant need not plead it, for he is not bound so to do.

Here if the Plaintiff had requested the Sealing of such a Grant of an Annuity, even the Defendant had Liberty either to execute it, or to pay the 300l. and where the Election is on the Obligor's Part, neither the Act or Neglect of the Obligee shall take it away from him; for it would be unreasonable that the Obligee should have his Choice, either to accept of the Annuity or the 300l. when 'tis a known Rule, That all Conditions where there is a Penalty in the Bond, are made in Favour, and for the Benefit of the Obligor, and the 300l. in this Case to be paid upon the Refusal of the Defendant to make such Grant, is in the Nature of a Penalty to enforce him to do it.

The principal Case in Moor 645. was agreed to be Law, but the Rule there put was denied, as not adequate to the present Case; which was, That if by the Act of God, or of the Party, or through Default of a Stranger, it becomes impossible for the Obligor to do one Thing in a Disjunctive Condition, he is notwithstanding bound to do the other.

This is true only as to the last Case, but not to the Two first; and for an Authority, * Laughter's Case was full in the Point, which is, That when a Condition consists of Two Parts in the Disjunctive, and both are possible at the Time of the Bond made, and afterwards one becomes impossible by the Act of God, or of the Party, the Obligor is not bound to perform the other Part.

* 5 Co.

And Judgment was given for the Defendant.

Smith *versus* Tracy. *In Banco Regis.*

Distribution shall be equally made amongst the Children of the Whole and Half Blood. Mod. Rep. 290. Jones 93. 1 Vent. 307. 2 Lev. 173.

IN a Prohibition, The Case was: A Man dies Intestate, having Three Brothers of the Whole Blood, and a Brother and Sister of the Half Blood; and the Question was, Whether they shall be admitted to a Distribution in an equal Degree?

Mr. Holt argued, That they were all in æquali Gradu, because before the Act of Distribution the Ordinary had Power to compel the Administrator to give and allot Filial Portions to the Children of the Deceased out of his Estate. And by the Civil Law, such Provision is made for the Children of the Intestate, that the Goods, which either the Father or Mother brought to each other

other at the Marriage, shall not remain to the Survivor, but the Use and Occupation of them only during Life, for the Property did belong to the Children.

By the Statute of 21 H. 8. cap. 5. the Ordinary is to grant Administration to the Widow of the Intestate, or to the next of his Kin, or to both, as by his Discretion he shall think good; and in case where divers Persons claim the Administration as next of Kin, which be in equal Degree, the Ordinary may commit Administration to which he pleaseth; and his Power was not abridged, but rather revived by this late Act, by which 'tis enacted, That just and equal Distribution shall be made amongst Wife and Children, or next of Kin in equal Degree, or legally representing their Stocks *pro suo cuique jure*; and the Children of the Half Blood do in the Civil Law legally represent the Father, and to some Purposes are esteemed before the Uncles of the Whole Blood. 22 & 23 Car. 2.

'Tis no Objection to say, That because the Law rejects the Half Blood as to Inheritances, therefore it will do the same as to Personal Estates, because such Estates are not to be determined by the Common, but by the Canon or Civil Law, and if so, the Half Blood shall come in for Distribution, for this Act of Parliament confirms that Law.

Winnington, Solicitor General, contra. He agreed, That before this Act the Half Blood was to have equal Share of the Intestate's Estate; but that now the Ordinary was compelled to make such Distribution, and to such Persons as by the Act is directed, for he had not an Original Power to grant Administration in any Case that did belong to the Temporal Courts, but it was given to him by the Indulgence of Princes, not quarenus a Spiritual Person, Hensloe's Case, 9 Co. Bendl. 133. Sid. 370, 371.

And if he had not Power in any Case, he could not grant to whom he pleased. But admitting he could, his Power is now abridged by this Statute, and he cannot grant but to the Wife and Children, or next of Kin in equal Degree, or legally representing their Stocks.

Now such legal Representation must be according to the Rules of the Common, and not of the Civil Law; for if there be Two lawful Brothers and a Bastard eigne, and a Question should arise concerning the Distribution of an Intestate's Estate, the subsequent Marriage according to the Law in the Spiritual Court would make the latter Legitimate, and if so, a legal Representative amongst them; but this Court will never allow him so to be.

But

But the Court were all of Opinion, That in Respect of the Father the Half-Blood is as near as those of the Whole, and therefore they are all alike, and shall have an equal Distribution; and that such Construction should be made of the Statute as would be most agreeable to the Will of the dead Person, if he had devised his Estate by Will; and it was not to be imagined if such Will had been made, but something would have been given to the Children of the Half-Blood: And thereupon a Consultation was granted.

Anonymus. *In C. B.*

Ante 102. FAux Judgment: viz. Serjeant Turner took this Exception, that the Plaintiff in the Court below had declared ad damnum 20 l. whereas it not being a Court of Record, and being sine Brevi, the Court could not hold Plea of any Sum above 40 s. and for this Cause the Judgment was reversed.

DE

DE
Termino Paſchæ.

Anno 29 Car. II. in Communi Banco.

Southcot *verſus* Stowel.

Intrat' Hill. 25 & 26 Car. 2. Regis Rot. 1303.

IN a Special Verdict in Ejectment, the Caſe was; Thomas Southcot having Iſſue Two Sons, Sir Popham and William, and being ſeiſed in Fee of a Farm called Indyo, (the Lands now in Queſtion) did upon the Marriage of his eldeſt Son Sir Popham, covenant to ſtand ſeiſed of the ſaid Farm to the Uſe of the ſaid Sir Popham Southcot, and the Heirs Males of his Body on Margaret his Wife to be begotten; and for want of ſuch Iſſue, to the Heirs Males of the Covenantor; and for want of ſuch Iſſue, to his own right Heirs for ever. Covenant to ſtand ſeiſed, how it differs from a Conveyance at the Common Law. Mod. Rep. 226.

Sir Popham had Iſſue begotten on his Wife Margaret, Edward his Son, and Five Daughters, and dies.

Thomas, the Covenantor, dies.

Edward dies without Iſſue.

And whether the Five Daughters, as Heirs general of Thomas, or William their Uncle, as Special Heir Male of Thomas per formam Doni, ſhall inherit this Land, was the Queſtion.

Two Objections were made againſt the Title of William, the Uncle:

1. Becauſe here is no expreſs Eſtate to Thomas the Covenantor, for 'tis limited to his Heirs Males, the Remainder to his own right Heirs; ſo that he having no Eſtate for Life, the Eſtate Tail could not be executed in him, and for that Reaſon William cannot take by Deſcent. Vaugh. 49.

2. He cannot take by Purchaſe, for he is to be Heir of Thomas, and Heir Male, the Limitation is ſo; but he cannot be Heir, for his Five Neeces are Heirs.

In

In answer to which, these Assertions were laid down:

1. That in this Case, Thomas the Covenantor hath an Estate for Life by Implication, and so the Estate Tail being executed in him, comes to William by Descent, and not by Purchase; for though the Covenantor had departed with his whole Estate, and limited no Use to himself, yet he hath a Reversion, because he can have no right Heir while he is living: And therefore the Hob. 30. Statute of 27 H. 8. creates an Use in him till the future Use cometh in esse, and by consequence the right Heirs cannot take by Purchase; for wherever the Heir takes by Purchase, the Ancestor must depart with his whole Fee, for which Reason a Fee cannot be raised by Way of Purchase to a Man's right Heirs, by the Name of Heirs, either by Conveyance of Land, or by Use or Devise, but it works by Descent, 1 Inst. 22. b.

And that Uses may arise by Implication by Covenants to stand seized, the Authorities are very plentiful, Moor 284. 1 Co. 154. Lord Paget's Case cited in the Rector of Cheddington's Case, Cro. Eliz. 321. 1 Roll. Rep. 239, 240, 317, 438. Lane *versus* Pannel.

Cro. Car. And in the Case of Hodgkinson and Wood, in a Devise there was the same Limitation as this; the Case was, Thomas being seised in Fee, had Issue, Francis and William, by several Venters, and devised Land to Francis his eldest Son for Life, then to the Heirs Males of his Body; and for Default of such Issue, to the Heirs Males of William, and the Heirs Males of their Bodies for ever; and for Default of such Issue, to Use of the right Heirs of the Devisor; then he made a Lease to William for 30 Years, to commence after his Death, and dies: William enters, and Surrenders this Lease to Francis, who enters and makes a Lease to the Defendant, and dies without Issue, and William enters and makes a Lease to the Plaintiff; it was adjudged for William, because he being Heir Male of the Body of the Devisor, had by this Limitation an Estate-Tail, as by Purchase, and that the Inheritance in Fee-Simple did not vest in Francis.

2. If Thomas the Covenantor had no Estate executed in him, yet William his Son in this Case may take by way of future Springing Use, because the Limitation of an Estate upon a Covenant to stand seised may be made to commence after the Ancestor's Death, for the old Seisin of the Covenantor is enough to support it.

There is a great Difference between a Feoffment to Uses, and a Covenant to stand seised, for by the Feoffment the Estate is executed presently, 1 Co. 154. Rector of Cheddington's Case: So if there be a Feoffment to A. for Life, Remainder to B. in Fee,

Fee, if A. refuſe, B. ſhall enter preſently, becauſe the Feoffor parted with his whole Eſtate; but if this had been in the Caſe of a Covenant to ſtand ſeiſed, if A. had refuſed, the Covenantor ſhould have enjoyed it again 'till after the Death of A. by way of ſpringing Uſe, like the Caſe of Parſons and Willis, 2 Roll. Abr. 794. Where a Man covenants with B. That if he doth not marry, he will ſtand ſeiſed to the Uſe of B. and his Heirs, B. dies, the Covenantor doth not marry; this Uſe ariſes as well to the Heir of B. as to B. himſelf, if he had been living, and he ſhall have the Land in the Nature of a Deſcent.

But if William cannot take it either by Purchaſe or by Deſcent, he ſhall take it.

3. Per formam Doni as ſpecial Heir to Thomas: This Caſe was compared to that in Littleton, Sect. 23. If Lands are given to a Man, and the Heirs Females of his Body, if there be a Son, the Daughter is not Heir; but yet ſhe ſhall take it for Voluntas Donatoris, &c.

So if Lands are given to a Man, and the Heirs Males of his Body, the youngeſt Son ſhall have it after the Death of the eldeſt, leaving Iſſue only Daughters, for theſe are Deſcents Secundum formam Doni.

So in this Caſe the Eſtate Tail veſted in Edward, and when he died without Iſſue, it comes to William per formam Doni.

Object. The Caſe of Greſwold in 4 & 5 Ph. & Mariæ, Dyer, 156. ſeems to be expreſs againſt this Opinion, which was, That Greſwold was ſeiſed in Fee, and made a Grant for Life, the Remainder to the Heirs Males of his Body, the Remainder to his own Right Heirs; he had Iſſue Two Sons, and died; the eldeſt Son had Iſſue a Daughter, and died; and if the Daughter or her Uncle ſhould have the Land, was the Queſtion in that Caſe: And it was adjudged, that the Limitation of the Remainder was void, becauſe Greſwold could not make his right Heir a Purchaſor, without departing with the whole Fee; and therefore Judgment was given againſt the ſpecial Heir in Tail for the Heir General, which was the Daughter. Poſtea: Brittain and Charnock.

Anſw. Admit that Caſe to be Law, (yet the Judges there differed in their Arguments,) 'tis not like this at Bar, for that Caſe was not upon a Covenant to ſtand ſeiſed, but upon a Deed indented, and ſo a Conveyance at the Common Law: But for an Authority in the Point, the Caſe of Pybus and Mitford was cited and relied on, which was Trin. 24 Car. 2. Rot. 703. adjudged by Hales Chief Juſtice, Rainsford and Wild, but Juſtice Twiſden was of a contrary Opinion. Mod. Rep. 159. 1 Ven. 372.

Serjeant Stroud, who argued on the other Side, made Three Points:

1. Whether this Limitation be good in its Creation?

2. If the Estate Tail be well executed in Thomas the Covenantor?

3. If it be good and well executed, whether when Edward died without Issue, the whole Estate Tail was not spent?

1. And as to the first Point, he held that this Limitation to the Heirs Males of Thomas, was void in the Creation, because a Man cannot make himself or his own right Heir a Purchasor, unless he will part with the whole Estate in Fee, Dyer, 309. b.

If A. being seised in Fee, makes a Lease for Life to B. the Remainder to himself for Years, this Remainder is void; so if it had been to himself for Life, because he hath an Estate in Fee, and he cannot reserve to himself a lesser Estate than he had before, 42 Ass. 2.

If I give Lands to A. for Life, the Remainder to my self for Life, the Remainder in Fee to B. after the Death of A. in this Case B. shall enter, for the Remainder to me was void, 1 H. 5. 8. 42 Edw. 3. 5. Bro. Estate 66 Dyer 69. b.

'Tis true, these Cases are put at the Common Law, but the Statute of Uses makes no Alteration; for according to the Rules laid down in Chudleigh's Case, by my Lord Chief Justice Popham, 1 Co. 138.

1. Uses are odious, and so the Law will not favour them.

2. A Rule at Common Law shall not be broke to vest an Use, and the Uses here cannot vest without breaking of a Rule in Law.

3. Uses are raised so privately, that he who takes them may not know when they vest, and for that Reason they are not to be favoured.

4. The Statute annexes both the Possession and the Use together, as they vest and divest both together, Moor 713. 2 Co. 91. Co. Lit. 22. Moor 284.

2. As to the second Point, the Estate is not executed in Thomas, and therefore William cannot take it by Descent; Heirs of his Body, or Heirs Male, are good Words of Limitation to take by Purchase from a Stranger, but not from an Ancestor, for there he shall take by Descent, and for this there is an Authority, Co. Lit. 26. b. John had Issue by his Wife Roberga, Robert and Mawd; John dies, Michael gave Lands to Roberga, and to the Heirs of her Husband on her Body begotten;

Ro-

Roberga in this Caſe had but an Eſtate for Life, for the Fee-Tail veſted in Robert, and when he died without Iſſue his Siſter Maud was Tenant in Tail per formam Doni, and in a Formedon ſhe counted as Heir to Robert, which ſhe was not, neither was ſhe Heir to her Father at the Time of the Gift, yet it was held good; for the Words, viz. Heirs of the Body of the Father, were Words of Purchaſe in this Caſe.

If therefore no Uſe for Life veſted in Thomas, then William cannot take by Deſcent, Dyer 156. Co. Lit. 22. Hob. 31. Dyer 309. 1 Co. 154. Lord Paget's Caſe, cited in Hob. 151.

3. To the third Point, Admitting both the former to be againſt him, yet ſince Edward is dead without Iſſue, the Eſtate Tail is ſpent.

But the whole Court were of Opinion, That William ſhould inherit this Land in Queſtion; for though at the Common Law a Man cannot be Donor and Donee, without he part with the whole Eſtate, yet 'tis otherwiſe upon a Covenant to ſtand ſeiſed to Uſes: And if any other Conſtruction ſhould be made, many Settlements would be ſhaken, in which nothing was more uſual now, than to covenant to ſtand ſeiſed to the Uſe of himſelf, and the Heirs Males of his Body, &c. Judgment.

They all agreed alſo, That the Eſtate being well limited, William ſhould take per formam Doni, as ſpecial Heir, for Voluntas Donatoris in Charta manifeſte expreſſa Obſervetur; and 'tis apparent Thomas intended that William ſhould have it, or elſe the Limitation to his Heirs Males had been needleſs.

So that taking it for granted, that the Eſtate Tail once veſted is not ſpent by his dying without Iſſue, but it comes to William by Deſcent, and not as a Purchaſor, for ſo he could not take it, becauſe he is not Heir, and 'till Thomas be dead without Iſſue, the Tail cannot be ſpent, ſo there was no Difficulty in that Point.

And they held the Opinions of Dyer and Saunders in Creſwold's Caſe to be good Law, who were divided from the other Juſtices, but they doubted of Pybus and Mitford's Caſe, whether it was Law or not; they doubted alſo, whether by any Conſtruction Thomas could be ſaid to have an Eſtate for Life by Implication; they doubted alſo of the ſpringing Uſe, but they held that this Limitation was good in its Creation, and Judgment was given accordingly.

Cockram *Executor versus* Welby.

Statute of Limitations not pleadable by a Sheriff, who levied Money by *Fi' fa'*, and 9 Years pass. Mod. Rep. 245. Cro. Car. 297.

IN Debt, the Plaintiff declared, That his Testator recovered a Judgment in this Court, upon which he sued out a Fieri facias, which he delivered to the Defendant being Sheriff of Lincoln, and thereupon the said Sheriff returned Fieri feci, but that he hath not paid the Money to the Plaintiff, per quod actio accrevit, &c.

The Defendant pleaded the Statute of Limitations, to which the Plaintiff demurred.

And the Question was, Whether this Action was barely grounded on the Contract, or whether it had a Foundation upon Matter of Record?

If on the Contract only, then the Statute of 21 Jacobi cap. 16. is a good Plea to bar the Plaintiff of his Action, which enacts, That all Actions of Debt, grounded upon any Lending or Contract, without Specialty, shall be brought within Six Years next after the Cause of Action doth accrew; and in this Case Nine Years had passed.

But if it be grounded upon Matter of Record, that is a Specialty, and then the Statute is no Bar.

Serjeant Barrel held this to be a Debt upon a Contract without Specialty, for when the Sheriff had levied the Money, the Action ceases against the Party, and then the Law creates a Contract, and makes him Debtor, as it is in the Case of a Talley delivered to a Customer.

It lies against an Executor, where the Action arises quasi ex Contractu, which it would not do if it did not arise ex Maleficio, as in the Case of a Devastavit.

'Tis true, the Judgment recovered by the Testator, is now set forth by the Plaintiff Executor, but that is not the Ground but only an Inducement to the Action, for the Plaintiff could not have pleaded nul tiel Record, so that 'tis the meer receiving the Money which charges the Defendent, and not Virtute Officii upon a false Return; for upon the Receipt of the Money he is become Debtor, whether the Writ be returned or not, and the Law immediately creates a Contract; and Contracts in Law are as much within the Statute, as actual Contracts made between the Parties.

All

All which was admitted on the other Side; but it was ſaid, that this Contract in Law was chiefly grounded upon the Record, and compared it to the Caſe of Attornies Fees, which hath been adjudged not to be within the Statute, though it be quaſi ex Contractu, becauſe it depends upon Matter of Record, Rolls Abridg. tit. Debt. 598. pl. 17.

And afterwards in Michaelmas-Term following, by the Opinions of the Chief Juſtice, Wyndham and Atkins, Juſtices, it was held that this Caſe was not within the Statute, becauſe the Action was brought againſt the Defendant as an Officer, who acted by vertue of an Execution; in which Caſe the Law did create no Contract, and that here was a Wrong done, for which the Plaintiff had taken a proper Remedy, and therefore ſhould not be barred by this Statute.

Juſtice Scroggs was of a contrary Opinion; for he ſaid, If another received Money to his Uſe due upon Bond, the Receipt makes the Party ſubject to the Action, and ſo is within the Statute.

But by the Opinions of the other Juſtices, Judgment was given for the Plaintiff.

Major *verſus* Grigg. *In Banco Regis.*

Covenant to ſave Harmleſs, and the Plaintiff ſets forth no Title in the Diſturber, good after Verdict.
Cro. Eliz. 914.
Cro. Jac. 315, 425.
Vaugh. 126, 121.
2 Sand. 178.
Mod. Rep. 66.

THE Plaintiff brought an Action, for that the Defendant Non indempnem conſervavit ipſum de & concernente Occupation' quorundam clauſorum, &c. ſecundum formam Agreamenti, and ſets forth a Diſturbance by one who commenced a Suit againſt him in ſuch a Term Concernente Occupation' clauſorum præd', but doth not ſet forth that the Perſon ſuing had any Title, which (it was ſaid) ought to have been ſhewn; as if a Man makes a Leaſe for Years, and covenants for quiet Enjoyment, in an Action brought by the Leſſee upon that Covenant, it muſt be ſhewn that there was a lawful Title in the Perſon who diſturbed, or elſe the Action will not lie.

But this being after a Verdict, and the Plaintiff ſetting forth in his Declaration, that the Diſturber recovered per Judicium Curiæ, the Court now were all of Opinion that Judgment ſhould be given for the Plaintiff.

Taylor

Taylor *verſus* Baker. *In Banco Regis.*

Payment to the Marſhal no Diſcharge to the Plaintiff at whoſe Suit the Defendant was in Execution.
T. Jones 97.
2 Lev. 203.

THE Caſe was; viz. A Man being in Execution, doth actually pay the Money to the Marſhal, for which he was impriſoned, and thereupon was diſcharged; and whether he ſhould pay it again to the Plaintiff upon a ſecond Execution, was the Queſtion.

Sanders argued, that he ſhould not pay it again; he ſaid, This Caſe was never adjudged, and therefore could produce no Authority in Point to warrant his Opinion, but Parallel Caſes there were many.

As if the Sheriff take Goods in Execution by vertue of a Fieri Facias, whether he ſells them or not, yet being taken from the Party againſt whom the Execution was ſued, he ſhall plead that Taking in Diſcharge of himſelf, and ſhall not be liable to a ſecond Execution, though the Sheriff hath not returned the Writ; and the Reaſon is, becauſe the Defendant cannot avoid the Execution, and he would therefore be in a very bad Condition if he was to be charged the ſecond Time.

And if the Sheriff ſhould die after the Goods are taken in Execution, his Executors are liable to the Plaintiff to ſatisfie the Debt, for they have paid pro quo, and 'tis in Nature of a Contract raiſed by Law.

By the Words of the Capias ad Satisfaciend' it doth appear, that the Deſign of that Writ is to enforce the Payment of the Debt by the Impriſonment of the Defendant: The Sheriff thereupon returns, that he hath taken the Body, and that the Defendant hath paid the Money to him, for which Reaſon he diſcharged him; and for this Return he was amerced, not becauſe he diſcharged the Party, but becauſe he had not brought the Money into the Court; for the Law never intended that a Man ſhould be kept in Priſon after he had paid the Debt.

In this Caſe the Defendant can have no Remedy to recover it again of the Marſhal, becauſe it was not a bare Payment to him, but to pay it over again to the Plaintiff, and likewiſe in Conſideration that he ſhould be diſcharged from his Impriſonment.

If it ſhould be objected by the Marſhal, that the Plaintiff hath an Action of Eſcape againſt him, and likewiſe by the Plaintiff, that he did not make the Gaoler his Steward or Bailiff to receive his Money:

Anſw.

Anſw. The Gaoler is made his Bailiff to keep the Party in Execution; and it would be very hard, that when the Priſoner will lay down his Money in diſcharge of the Debt, that the Gaoler ſhould not have full Power to diſcharge him.

If he had come in Michaelmas-Term after the long Vacation, and informed the Court that he had offered to pay the Execution-Money to the Marſhal, and that he would not take it, and that the Plaintiff could not be found, the Court would have made a Rule to help him.

Mr. Holt, contra. If the Payment had been good to the Sheriff or Marſhal, yet 'tis not pleadable to the ſecond Execution, becauſe 'tis Matter in Fact.

That which hath been objected, that the Party ſhall plead to a ſecond Execution, that his Goods were taken by a former Fieri Facias cannot be; for no ſuch Plea can be good, becauſe by that Writ the Sheriff hath expreſs Authority to levy the Money; and the Plea is not Payment to the Sheriff, but that the Money was levied by him by vertue of the Writ, which ought to be brought into the Court, and an Audita Querela lies againſt the Plaintiff, and then the Defendant is to be bailed, 1 Leon. 141. Askew *verſus* the Earl of *Lincoln.*

Jones and Rainsford were of Opinion, That the Defendant might have Remedy againſt the Marſhal to recover his Money again, and that the Payment to him was no Diſcharge to the Plaintiff at whoſe Suit he was in Execution: But Juſtice Wyld was of another Opinion: Quære.

The Lord Marqueſs of *Dorcheſter*'s Caſe. *In Communi Banco.*

IN a Scandalum Magnatum: Serjeant Pemberton moved to have good Bail, which the Court denied, and ſaid, That in ſuch Caſe Bail was not requirable; but notwithſtanding the Defendant conſented to put in 50 l. Bail.

Viſne not chang'd in a *Scandalum Magnatum.*

And then upon the uſual Affidavit moved to change the Viſne, the Action being laid in London, which was oppoſed by the Serjeant, who deſired that it might be tried where it was laid; but he ſaid in this Caſe, that the Viſne could not be changed.

1. Becauſe

1. Because the King is a Party to the Suit, for 'tis tam pro Domino Rege quam pro seipso.

2. The Plaintiff is a Lord of Parliament which is adjourned and will meet, and therefore it would be inconvenient to try the Cause in the Country, since the Service of the King and Kingdom doth require his Attendance here; and he said, That upon the like Motion in B. R. betwæn the Lord Stamford and Needham, the Court would not change the Visne.

1 Ven. 363. 4 T. Jones 192. cont'.

North, Chief Justice, said, That he always took it as a current Opinion, that in a Scandalum Magnatum the Visne could not be changed; for since it was in the Nature of an Information, it being tam quam, 'twas advisable whether it was not within the Statute of 21 Jac. which doth appoint Informations to be tried in their proper Counties.

T. Jones 192.

But Justice Atkins inclined, that the Visne might be changed; for though by the Wisdom of the Law a Jury of the Neighbourhood are to try the Cause, yet in Point of Justice the Court may change the Visne; to which it was objected, that then there would be no Difference betwæn local and transitory Actions.

Actions of Debt and Accompt shall be brought in their proper Counties, 6 R. 2. and it was argued, that an Attorney is sworn to bring Actions no where else.

But the Court not agreeing; at last the Defendant was willing that the Cause should be tried in London, if the Plaintiff would consent not to try it before the first Setting in the next Term.

And as to that Reason offered, why the Visne should not be changed, because the Plaintiff was a Lord of Parliament, Justice Atkins said, That that did not satisfie him; it might be a good Ground to move for a Trial at the Bar; to which it was answered, That in the Case of the Earl of Shaftsbury the Court would not grant a Trial at the Bar without the Consent of the Defendant.

The Visne was not changed.

Beaver

Beaver *verſus* Lane.

COvenant made to Baron and Feme, the Husband alone brings the Action, Quod teneat ei conventionem ſecundum formam & effectum cujuſdam Indenturæ inter Querentem ex una parte & Defendentem ex altera parte confect', and this was for not repairing his Houſe: After Verdict for the Plaintiff it was moved in Arreſt of Judgment, becauſe of this Variance.

But the Court ordered, that the Plaintiff ſhould have his Judgment, for the Indenture being by Baron and Feme, it was therefore true, that it was by the Baron, and the Action being brought upon a Covenant concerning his Houſes, and going with them, though it be made to him and his Wife, yet he may refuſe quoad her, and bring the Action alone: And the Chief Juſtice ſaid, That he remembred an Authority in an old Book, That if a Bond be given to Baron and Feme, the Husband ſhall bring the Action alone, which ſhall be looked upon to be his Refuſal as to her.

Covenant to Baron and Feme, the Baron alone may bring the Action.

Calthorp *verſus* Phillips.

THE Queſtion was, in regard a Superſedeas is not returnable in the Court, whether the old Sheriff is bound to deliver it over to the new One or no; and it was urged that it ought not, becauſe the old Sheriff is to keep it for his Indemnity, and he may have Occaſion to plead it.

But on the other Side it was inſiſted by Serjeant George Strode, that it ought to be delivered to the new Sheriff, and that there was a Writ in the Regiſter, which proved it, fol. 295; and if it ſhould be otherwiſe, theſe Inconveniences would follow:

1. It would be inconvenient that the Capias againſt the Defendant ſhould be delivered to the new Sheriff, and not the Superſedeas which was to admit the Charge and not the Diſcharge, Weſtby's Caſe, 3 Co. 73. And it was the conſtant Practice not only to deliver the Superſedeas, but the very Book in which 'tis allowed; and this he ſaid appeared by the Certificates of many Under-Sheriffs, which he had in his Hand.

2. If the Sheriff hath an Exigent againſt B. who appears and brings a Superſedeas to the old Sheriff, and then a new Sheriff is made, if he hath not the Superſedeas he may return him outlawed by Vertue of the Exigent; ſo in the Caſe of a Judgment ſet aſide for Fraud or Practice, and a Superſedeas granted; and the like in the

Superſedeas muſt be delivered by the old Sheriff to the new One. Mod. Rep. 222.

Caſe of an Eſtrepment which is never returned; and it would be an endleſs Work upon the coming in of every Sheriff to renew this Writ.

As to the Objection, That the old Sheriff may have Occaſion to plead it: As often as ſuch Occaſion happens, he may have Recourſe to it in the Office of the new Sheriff; and he can have no Title to it by the Direction of the Writ, for that is Vicecomiti Berks, and not to him by expreſs Chriſtian and Sirname; and of that Opinion was all the Court, and Judgment was given accordingly niſi Cauſa, &c.

Hamond *verſus* Howel *Recorder of* London.

An Action will not lie againſt a Judge for what he doth judicially, tho' erroneouſly. Mod. Rep. 184.

FAlſe Impriſonment. The Defendant pleads ſpecially; the Subſtance of which was, That there was a Commiſſion of Oyer and Terminer directed to him amongſt others, &c. and that before him and the other Commiſſioners Mr. Penn and Mr. Mead, Two Preachers, were indicted for being at a Conventicle; to which Indictment they pleaded Not-Guilty, and this was to be tried by a Jury, whereof the Plaintiff was one; and that after the Witneſſes were ſworn and examined in the Cauſe, he and his Fellows found the Priſoners, Penn and Mead, Not-Guilty, whereby they were acquitted; & quia the Plaintiff male ſe geſſerit in acquitting them both againſt the Direction of the Court in Matter of Law, and againſt plain Evidence, the Defendant and the other Coumiſſioners then on the Bench fined the Jury 40 Marks a-piece, and for Non-payment committed them to Newgate, &c.

The Plaintiff replies, de Injuria ſua propria abſque hoc, that he and his Fellows acquitted Penn and Mead againſt Evidence; and to this the Defendant demurred.

Serjeant Goodfellow, who would have argued for the Defendant, ſaid, That he would not offer to ſpeak to that Point, whether a Judge can fine a Jury for giving a Verdict contrary to Evidence, ſince the Caſe was ſo lately and ſolemnly reſolved by all the Judges of England, in * Buſhel's Caſe, that he could not fine a Jury for ſo doing.

* Vaugh. 146.

But admit a Judge cannot fine a Jury, yet if he doth, no Action will lie againſt him for ſo doing, becauſe 'tis done as a Judge, 12 H. 4. 3. 27 Aſſ. pl. 12. But the Court told him, That he need not to labour that Point, but deſired to hear the Argument on the other Side what could be ſaid for the Plaintiff.

1 Roll. Abr. 92. Liter. Q. pl. 1.

Serjeant

Serjeant Newdigate argued, that this Action would lie.

1. It muſt be admitted, that the Impriſonment of the Jury was unlawful, and then the Conſequence will be, that all that was done at that Time by the Commiſſioners or Judges was both againſt Magna Charta and other Acts of Parliament, the Petition of Right, &c. and therefore their Proceedings were void, or at leaſt very irregular to impriſon a Jury-man without Preſentment or due Proceſs in Law, and conſequently the Party injured ſhall have an Action for his falſe Impriſonment.

In 10 H. 6. f. 17. In an Action brought for falſe Impriſonment, the Defendant juſtifies the Commitment to be for Suſpicion of Felony; but becauſe he did not ſhew the Ground of ſuch Suſpicion, the Juſtification was not good.

The Trial of Penn and Mead, and all Incidents thereunto, as ſwearing the Jury, examining of the Witneſſes, taking of the Verdict, and acquitting the Priſoner, were all within the Commiſſion; but the fining of the Jury, and the impriſoning of them for Non-payment thereof, was not juſtifiable by their Commiſſion, and therefore what was done therein was not as Commiſſioners or Judges.

If this Action will not lie, then the Party has a Wrong done, for which he can have no Remedy; for the Order for paying of the Fine was made at the Old-Baily, upon which no Writ of Error will lie; and though the Objection, that no Action will lie againſt a Judge of Record for what he doth quatenus a Judge, be great, the Reaſon of which is, becauſe the King himſelf is de Jure to do Juſtice to his Subjects, and becauſe he cannot diſtribute it himſelf to all Perſons, he doth therefore delegate his Power to his Judges, and if they misbehave themſelves, the King himſelf ſhall call them to Account, and no other Perſon, 12 Co. 24, 25.

But that concerns not this Caſe, becauſe what was done here was not warranted by the Commiſſion, and therefore the Defendant did not act as a Judge; and this Difference hath been taken and allowed, That in the Caſe of an Officer, if the Court hath Juriſdiction of the Cauſe, no Action will lie againſt him for doing what is contrary to his Duty; but if all the Proceedings are coram non Judice, and ſo void, an Action doth lie, 10 Co. 77.

So in the Caſe of a Juſtice of the Peace or Conſtable, where he exceeds his particular Juriſdiction; ſo if a Judge of Niſi Prius doth any Thing not warranted by his Commiſſion, 'tis void.

And that the Commiſſioners here had no Power to impoſe this Fine, he argued from the very Nature of the pretended Offence, which was neither a Crime or in any wiſe puniſhable, becauſe what the Plaintiff did was upon his Oath; and for that Reaſon it hath

* Bridgman 131.

been adjudged in the Case * Agard *and* Wild, that an Action would not lie against one of the Grand Jury after an Acquittal, for procuring One to be indicted for Barretry, because he is upon his Oath, and it cannot be presumed that what he did was in Malice.

The Habeas Corpus gives the Party Liberty, but no Recompence for his Imprisonment, that must be by an Action of false Imprisonment, if otherwise, there would be a failure of Justice; and it might encourage the Judges to act ad Libitum, especially in inferior Courts, where Mayors and Bailiffs might punish Juries at their Pleasures, which would not only be a Grievance to the Subject, but a Prejudice to the King himself, because no Juries would appear where they are subject to such arbitrary Proceedings.

An Action on the Case lies against a Justice of the Peace for refusing to take an Oath of a Robbery committed, 1 Leon. 323. and yet it was objected that there he was a Judge, Quære, Brook 204. March 117. for which Reasons he prayed Judgment for the Plaintiff.

Curia.

But the whole Court were of Opinion, that the bringing of this Action was a greater Offence than fining of the Plaintiff, and committing of him for Non-payment, and that it was a bold Attempt both against the Government and Justice in general.

The Court at the Old-Baily had Jurisdiction of the Cause, and might try it, and had Power to punish a Misdemeanour in the Jury; they thought it to be a Misdemeanour in the Jury to acquit the Prisoners, which in truth was not so, and therefore it was an Error in their Judgments, for which no Action will lie: How often are Judgments given in this Court reversed in the King's-Bench? And because the Judges have been mistaken in such Judgments, must that needs be against Magna Charta, the Petition of Right, and the Liberties of the Subject? These are mighty Words in Sound, but nothing to the Matter.

There hath not been one Case put which carries any Resemblance with this; those of Justices of the Peace and Mayors of Corporations are weak Instances; neither hath any Authority been urged of an Action brought against a Judge of Record for doing any Thing quatenus a Judge.

That Offences in Jury-men may be punished without Presentment, is no new Doctrine; as if they should either eat or drink before they give their Verdict, or for any Contempt whatsoever: But 'tis a new Doctrine to say, That if a Fine be set on a Jury-man at the Old-Baily, he hath no Remedy but to pay it; for a Certiorari

rari may be brought to remove the Order by which it was imposed, and it may be discharged if the Court think fit.

As to what hath been objected concerning the Liberty of the Subject, that is abundantly secured by the Law already; a Judge cannot impose upon a Jury for giving their Verdict contrary to Evidence; if he doth any Thing unjustly or corruptly, Complaint may be made to the King, in whose Name Judgments are given, and the Judges are by him delegated to do Justice, but if there be Error in their Judgments, as here, 'tis void; and therefore the Barons of the Exchequer might refuse to issue Process upon it, and there needs no Writ of Error, for the very Estreats will be vacated.

Though the Defendants here acted erroneously, yet the contrary Opinion carried great Colour with it, because it might be supposed very inconvenient for the Jury to have such Liberty as to give what Verdicts they please; so that though they were mistaken, yet they acted judicially, and for that Reason no Action will lie against the Defendant; and Judgment was given accordingly.

The Case of the Warden of the *Fleet*.

COmplaint was made by Serjeant Turner on the Part of the Parishioners of St. Brides, London, against the Warden of the Fleet and his Prisoners, for that he suffered several of them to be without the Walls of his Prison, in Taverns and other Houses adjoining to the Prison and fronting Fleet-Ditch, where they committed Disorders, and when the Constable came to keep the Peace, and to execute a Warrant under the Hand and Seal of a Justice of Peace, they came in a tumultuous Manner, and hindered the Execution of Justice, and rescued the Offenders, and often beat the Officers, the Warden often letting out 20 or 30 of his Prisoners upon any such Occasion to inflame the Disorder.

It was prayed therefore, That this Court, to which the Prison of the Fleet doth immediately relate, might give such Directions to the Warden, that these Mischiefs for the future might be prevented, and that the Court would declare those Houses out of the Prison to be subject to the Civil Magistrate.

The Court were all of Opinion, (but Justice Atkins, who doubted) that nothing can properly be called the Prison of the Fleet, which Curia

which is not within the Walls of the Prison, and that the Warden cannot pretend an Exemption from the Authority of the Civil Magistrate in such Places as are out of the Prison Walls, though Houses may be built upon the Land belonging to the Fleet; for the Preservation of the King's Peace is more to be valued than such a private Right.

But Justice Atkyns said, If such Places were within the Liberties of the Fleet, he would not give the Civil Magistrate a Jurisdiction in Prejudice of the Warden, but thought it might be fit for the Court to consider upon what Reason it was that the Warden of the Fleet applied such Houses to any other Uses than for the Benefit of the Prisoners; whereupon the Court appointed the Prothonotaries to go thither and give them an Account of the Matter, and they would take farther Order in it.

St. Mary Magdalen Bermondsey *Church in* Southwark. *In Scaccario.*

Rate for Building a Church shall be set by the Parishioners. Jones 89. Mod. Rep. 236.

IN a Prohibition, it was the Opinion of the whole Court, That if a Church be so much out of Repair, that 'tis necessary to pull it down, and that it cannot be otherwise repaired; that in such Case upon a general Warning or Notice given to the Parishioners, much more if there be Notice given from House to House, the major Part of the Parishioners then present, and meeting according to such Notice, may make a Rate for pulling down of the Church to the Ground, and building of it upon the old Foundation, and for making of Vaults where they are necessary, as they were in this Church, by reason of the springing Water; and though the Rate be higher than the Money paid for doing all this, yet 'tis good, and the Church-wardens are chargeable for the Overplus, they not being able to compute to a Shilling.

That if any of the Parishioners refuse to pay their Proportion according to the Rate, they may be Libelled against in the Spiritual Court; and if the Libel alledge the Rate to be pro Reparatione Ecclesiæ generally, though in Strictness Ecclesia contains both the Body and Chancel of the Church; yet by the Opinion both of the Court of Common-Pleas and of the Exchequer, it shall be intended, that the Rate was only for the Body of

of the Church; but in this Caſe it was made appear clearly, that the Rate was only for the Body, and that the Miniſter was at the Charge of the Chancel.

And both Courts agreed, That when a Prohibition is moved and deſired on purpoſe to ſtop ſo good a Work as the Building a Church, the Court will not compel the Parties to take Iſſue upon the Suggeſtion, when upon Examination they find it to be falſe, and therefore will not grant a Prohibition; for if the Rate be unduly impoſed, the Party grieved hath a Remedy in the Spiritual Court, or may appeal if there be a Sentence againſt him.

The Biſhop or his Chancellor cannot ſet a Rate upon a Pariſh, but it muſt be done by the Pariſhioners themſelves; and ſo North, Chief Juſtice, ſaid, That it had been lately ruled in the Common-Pleas.

Afterwards the Court of King's-Bench was moved for a Prohibition in this Caſe, and it was denied, ſo that in this Caſe there was the Opinion of all the Three Courts. This Matter was ſo much laboured, becauſe Twenty Four Quakers were reported to be concerned in the Rate, and they were unwilling to pay towards the Building of a Church.

Paget *verſus* Voſſius. *In B. R.*

A Trial at the Bar in Ejectione Firmæ, in which the Jury found a ſpecial Verdict: The Caſe was, viz. That Dr. Voſſius the Defendant, being an Alien, and a Subject of the States of Holland, falling into Diſgrace there, had his Penſion taken from him by publick Authority: Afterwards he came into England, and contracted a great Friendſhip with one Dr. Brown a Prebendary of Windſor; Then a War broke out between England and Holland, and the King iſſued forth his Proclamation, declaring the ſaid War, and the Hollanders to be Alien Enemies.

Judgment given upon the Conſtruction of Words in a Will.
Jones 73.
1 Ven. 325.
2 Lev. 191.

Dr. Brown being ſeiſed of the Lands now in Queſtion, being of the Value of 200 l. per Ann. and upwards, made his Will in theſe Words in Writing, Inter alia, *viz.* Item I give all my Manor of *S.* with all my Freehold and Copyhold Lands, *&c.* to my dear Friend Dr. *Iſaac Voſſius*, during his Exile from his own Native Country; but if it pleaſe God to reſtore him to his Country, or take him out

out of this Life, then I give the ſame immediately after ſuch Reſtoration, or Death, to Mrs. *Abigal Hevenignham* for ever.

A Peace was afterwards concluded between England and Holland, whereby all Intercourſes of Trade between the Two Nations became lawful; but Dr. Voſſius was not ſent for over by the States, nor was there any Offer of Kindneſs to him, but his Penſion was diſpoſed of and given to another.

That the Doctor might return into his own Country when he pleaſed, but that he ſtill continued in England.

And whether he or the Leſſor of the Plaintiff, Mrs. Hevening-ham, had the better Title, was the Queſtion.

Note, Dr. Voſſius was enabled to take by Grant from the King.

Ex parte Quer.

Pemberton, Serjeant for the Leſſor of the Plaintiff, argued, That the Eſtate limited to the Defendant is determined, which depended upon the Conſtruction of this Deviſe. He did agree that the Will was obſcure, and the Intent of the Deviſor muſt be collected from the Circumſtances of the Caſe; and is is a Rule, That according to the * Intent of the Parties a Will is to be interpreted.

* 2 Cro. 62. 371, 416.

'Tis plain then, that the Deviſor never intended the Defendant an Eſtate for Life abſolutely, becauſe it was to depend upon a Limitation, and the Words are expreſs to that Purpoſe, for he deviſes to him during his Exile, &c.

Now the Queſtion is not ſo much what is the genuine and proper Senſe and Signification of thoſe Words, as what the Teſtator intended they ſhould ſignifie.

1. Therefore the moſt proper Signification of the Word Exile, is a penal prohibi ting a Perſon from his Native Country; and that is ſometimes by Judgment or Edict, as in the Caſe of an Act of Parliament; and ſometimes 'tis choſen to eſcape a greater Puniſhment, as in Caſes of Abjuration and Tranſportation, &c.

But he did not think that the Teſtator took the Word Exile in this reſtrained Senſe, for Dr. Voſſius was never formally or ſolemnly Baniſhed; if that ſhould be the Senſe of the Word, then nothing would paſs to the Doctor by this Will, becauſe the Limitation would be void; and like to the Caſe of a Deviſe to a married Woman durante Viduitate, and ſhe dies in the Life-time of her Huſband; or to a Woman Sole during her Coverture, or of a Deviſe to A. the Remainder to the right Heirs of B. and A. dies living B. ſo that this could not be his Meaning.

2. The

2. The Word Exile, in common Parlance, is taken only for Abſence from ones Native Country; but this is a very improper Signification of the Word, and nothing but a Catachreſis can juſtify it, and therefore the Teſtator could not intend it in this Senſe; 'tis too looſe and inconſiderable an Interpretation of the Word for the Judgment of the Court to depend on, unleſs there were circumſtantial Proofs, amounting almoſt to a Demonſtration that it was thus meant: But it plainly appears by the following Words, this was not the Meaning of the Teſtator; for 'tis ſaid, If it pleaſe God to reſtore him to his Country; which ſhews that there was ſome Providence or other which obſtructed his Return thither, and ſo could not barely intend a voluntary Abſence; for if ſo, he might have expreſſed it; viz. during his Abſence from his Country, or 'till his Return thither, or whilſt he ſhould ſtay in England, and not in ſuch doubtful Words.

3. By the Word Exile, is meant a Perſon's lying under the Diſpleaſure of the Government where he was born, or of ſome great Perſons who have an Influence upon the Government, or have an Authority over him; which makes him think convenient (conſidering ſuch Circumſtances) to withdraw himſelf, and retire to ſome other Place; and this is a Senſe of the Word between both the former, and even in the Common Law we are not Strangers to the Acceptation of the Word in that Senſe. There is a Caſe omni exceptione major in the Writ of Waſte, which is, Fecit vaſtum de domibus, venditionem de boſcis, & exilium de hominibus; 'tis in the Regiſter, and in the Writ on the Statute of Marlebridge, cap. 24. where by the exilium de hominibus, is meant the hard Uſage of Tenants, or the Menacing of them, whereby they flie from their Habitations, 2 H. 6 11.

'Tis found in this Caſe, that the Defendant was under the Diſpleaſure of his Governors, the War broke out; and therefore it might not then be ſafe for him to return; and for that Reaſon he might think it ſafe for himſelf to abide here, and this Dr. Brown the Teſtator might know, which might alſo be the Reaſon of making the Will.

But now all Acts of Hoſtility are paſt, and ſo the Defendant's Receſs is open; and it hath pleaſed God to reſtore the Doctor, but he is not pleaſed to reſtore himſelf, for the Jury find he is not returned: Now if a Man hath an Eſtate under ſuch a Limitatoin to do a Thing which may be done when it pleaſeth the Party; in ſuch Caſe if he neglect or refuſe to do the Thing, the Eſtate is determined, 15 H. 7. 1.

If I grant a Man an Annuity 'till he be promoted to a Benefice, and I provide a Presentation for him, and he will not be Instituted and Induced, the Annuity ceases; so shall the Estate in this Case, because the Devisor seems to appoint it to the Defendant till he may return.

Ex parte Def.

Mr. Holt, contra, held, That the Estate is not determined, but had a Continuance still. In his Argument he considered these Four Things.

1. Whether upon Dr. Vossius's coming into England, (being under the Displeasure of the Government where he was born) he was an Exile?

And he held, that he was an Exile: Which Word, in Plainness of Speech, doth not only concern a Person prohibited to live in his Native Country by Act of State, but one who leaves his Country upon other Occasions. And Calvin the Civilian, in his Lexicon, tells us, That an Exile is one qui extra solum habitat; and in all the Descriptions of Exilium, 'tis divided into voluntary and Involuntary. Plutarch and Livy use it in the Sense of a voluntary leaving of a native Country, where 'tis said of Petrellus, in voluntarium profectus est Exilium.

If a Man leaves his Country upon the Displeasure of the Governors, or fearing any Danger of Life, or even upon the Loss of his Livelihood, this is little different from involuntary Exile, and this is the Case of the Defendant; who, though he is not prohibited to continue in such Exile, yet he is disabled to return; and though he is not punished for staying, yet if he return, he is in Danger of being starved.

As for the Case of Exilium de hominibus, it makes for the Defendant's Purpose, for in the 1 Inst. 53. b. 'tis said, If Tenants be impoverished, that is an Exilium: And have not the States taken away the Doctor's Livelihood, and impoverish'd him as much as they can? And therefore he had good Cause to seek Relief elsewhere.

Now the same Cause continues still, for 'tis not found by the special Verdict that there was any Reconciliation between the States and him, or that he may have his Pension again, if he should return; but on the contrary, that 'tis disposed of to another: And 'tis apparent that there was a great Friendship between the Testator and the Defendant, who took Notice of the Circumstances of Dr. Vossius's Condition at that Time, which is in no Sort altered from what it was at the Time of the Making of the Will; so that by the Word restored, nothing else could be intended by Dr. Brown, than when his Friend should have the Favour of the States, and a comfortable Subsistence in his own Country.

2. Dr.

2. Dr. Voſſius is not to be conſidered with any Relation to the War, becauſe he came into England before the War proclaimed; neither doth it appear by the ſpecial Verdict that he was any wiſe concerned in it: If a Subject of England go into Holland, and a War break out, 'tis no Reſtraint of his Perſon if he be not active in it, for he may return as he hath Opportunity ſo to do.

3. Admitting Dr. Voſſius to be concerned in the War, yet the Peace enſuing can be no Reſtitution of him to his Country, that only extinguiſhes the Hoſtility between the Two Nations, and doth not reſtore the Doctor, who during the War adhered to the King of England, and ſo was a Rebel to the States; and for that Reaſon a Peace ſhall not extend to pardon him.

4. Admitting the Doctor to be no Exile, then the Limitation in the Will is void, and a void Limitation is like a void Condition, and then the Eſtate is abſolute in him; if it had been a Condition precedent, as a Deviſe to him in caſe he was not an Exile, that had prevented the veſting of the Eſtate; but if the ſubſequent Limitation be impoſſible, they muſt ſhew on the other Side that the Eſtate is determined.

Rainsford Chief Juſtice was clear of Opinion, that the Eſtate doth continue in the Defendant by this Limitation, until the Circumſtances of his Caſe, (as to the Favour of the States, and the Offer of his Penſion, or ſome competent Way of Livelihood) differ from what they did at the Time of the Making of the Will; and it doth not appear that there was any Alteration of his Condition, nor any Expectation of a Penſion from the States now, more than he had at that Time.

Whereupon in Michaelmas-Term following, Judgment was given for the Defendant Voſſius by the Opinion of the whole Court of King's-Bench.

Strangford *verſus* Green.

IN an Action on the Caſe for Non-performance of an Award; the Defendant having, in Behalf of himſelf and his Partner, referred all Differences and Controverſies between the Plaintiff and them to Arbitrators, and promiſed to perform their Award; which was, That all Suits which are proſecuted by the Plaintiff againſt the Defendant ſhall ceaſe, and that he ſhall pay the Plaintiff ſo much, &c. And for Non-payment this Action was

Award that all Suits ſhall ceaſe amounts to a Releaſe.

brought upon this ſpecial Declaration, to which the Defendant did demur.

2 Cro. 639, 663.

1. Becauſe the Submiſſion was only of Matters concerning the Partnerſhip, and the Award was, That all Suits ſhall ceaſe.

2. It was of all Matters between the Plaintiff and the Partner, and the Award is, That all Suits proſecuted againſt the Defendant only ſhall ceaſe.

3. The Award is not mutual; for the Defendant is to pay Money, but the Plaintiff is to give no Releaſe, 'tis only ſaid that all Suits ſhall ceaſe.

5. The other Partner is not made a Party to the Submiſſion.

2 Cro. 663.

But theſe Exceptions were not allowed; for no Difference ſhall be intended but what concerned the Plaintiff and the Defendant, as the Defendant was concerned with his Partner in Trade only, unleſs the contrary did appear; and if any ſuch were, they ſhould be ſhewn on the other Side.

And it ſhall be intended likewiſe that all Suits ſhall ceaſe only between the Plaintiff and the Defendant, and that was an Award on both Sides; for the awarding that all Suits ſhall ceaſe hath the Effect of a Releaſe, and the Submiſſion and Award may be pleaded in Diſcharge as well as a Releaſe; and likewiſe the Defendant may undertake for his Partner, and having engaged for him, and promiſed that he ſhould perform the Award on his Part, (notwithſtanding the Partner is not bound ſo to do) yet if he refuſe, 'tis a Breach of the Defendant's Promiſe, and ſo the Plaintiff had Judgment upon the firſt Argument.

Sir John Shaw *againſt a Burgeſs of* Colcheſter.

THIS was upon a Tryal at the Bar, wherein the Caſe was this, viz. The Plaintiff was a Serjeant at Law, and Recorder of Colcheſter, and the Defendants reſolving to turn him out, procured Articles of Miſdemeanour to be drawn againſt him, and then all who had Liberty to vote, proceeded to vote for and againſt him, and a Poll was granted to decide the Controverſy, it not appearing upon the View which had the Majority of Votes; but before the Plaintiff had taken all the Names, and whilſt he was taking off the Poll, the Defendants took away the Paper, and would not ſuffer him to proceed; the Jury gave him 300 l. Damages.

Trotter

Trotter *verſus* Blake. *In Scaccario.*

THIS was the Caſe of my Lord Hollis upon a Trial at the Bar in the Exchequer in an Ejectione firmæ, wherein the Caſe was this: Viz.

Ejectment will not lie for a Forfeiture, where the Tenant refuſed to pay a Fine being doubtful.

The Lord Hollis was ſeiſed of the Manor of Aldenham in the County of Hartford in Fee, and the Lands in Queſtion were held of the ſaid Lord by Copy of Court-Roll, and are Parcel of the aforeſaid Manor.

That the Defendant was admitted Tenant, and a Fine of 8 l. impoſed upon him for ſuch Admittance, payable at Three diſtinct Payments; that the 8 l. was perſonally demanded of him by the Lord's Steward, and he refuſed Payment; whereupon the Lord enters and ſeiſes the Eſtate for a Forfeiture, which he would not have inſiſted on, but that the Obſtinacy of the Defendant made it neceſſary for him to aſſert his Title and Right.

Mr. Walker, the Lord Hollis his Steward, being ſworn, gave Evidence, that a Fine of 8 l. was ſet upon the Defendant when he was admitted, and that the Lands to which he was admitted were uſually let for 7 l. per Annum, ſo that the Fine was but a little more than a Year's Value: That he himſelf demanded the 8 l. of the Defendant, being a Seafaring-man, who refuſed to pay it. That he knew the Defendant to be the ſame Perſon who was admitted to this Copyhold: That the Demand was made at the Steward's Chamber in Staple-Inn, and becauſe it was payable at Three ſeveral Days, he then demanded of him only 2 l. 13 s. 4 d. as a Third Part of the 8 l. and that he did enter upon the 25th Day of November laſt, for Non-payment of the ſaid 2 l. 13 s. 4 d.

Ex parte Def.

The Council for the Defendant inſiſted, That the Steward ought to produce an Authority in Writing given to him by the Lord, to make this Demand and Entry upon Refuſal, for the Lord's owning it afterwards will not make a Forfeiture.

Curia.

But the Court held clearly, that there was no Need of an expreſs Authority in Writing, and that it was not neceſſary for the Steward to make a Precept for the Seizure, but that it was neceſſary that the Demand ſhould be perſonal.

The Reaſon why the Defendant refuſed to pay this Fine was, becauſe he ſaid that by a Decree and Survey made of this Manor in the Reign of Queen Elizabeth, the Fine to be paid for this Copyhold was ſettled, and it was but 3 l. and no more.

And

And Sir Francis Winnington, Solicitor General, said for the Defendant, that the Case was very penal on his Side, but that he would make it clear that there was no Colour for the bringing of this Action either as to the Matter or the Form.

He said, That the Manor of Aldenham had not been long in this noble Lord, he came in as Purchaser or a Mortgagee under the Family of the Harvies whose Inheritance it was anciently; and there has been some Doubt whilst it was in their Possession what Fines were customary to be paid upon Descents and Alienations; but that is now settled, and the Defendant was in the Case of a Descent, for which the Fine is not to be arbitrary at the Will of the Lord; but is reduced to a Certainty in Queen Elizabeth's Reign by Consent and Agreement between the Lord and Tenants; and that a Survey was then made by Vertue of a Commission directed to some Men of Credit and Worth in those Days, who were impowered to set forth the Quantity of Land, and the Value thereof, which was done accordingly; and it was then agreed, That a Year and an halfs Value in case of a Descent, and Two Years Value in case of an Alienation, should be paid as a Fine to the Lord, and the Proportion of the Value was then computed by the Commissioners, and decreed by the Court of Chancery to be binding to the Lords and Tenants for ever.

The Question now is, How this Year's Value shall be computed? The Lord would have it according to the improved Value; the Tenant will pay according as it was rated in Queen Elizabeth's Time by those Commissioners. Now if this Land had decayed in Value, the Tenant had still been obliged to pay a Fine according to the Valuation of that Time; and if so, it would be very unreasonable to make him pay for his Industry and Improvement of the Land now it is raised in Value, because that was done by his Labour, and at his Expence; so that the Doubt being what Fine shall be paid, an Ejectione firmæ will not lie, because the Matter is doubtful, and the Law gives the Tenant Liberty to contest it with the Lord, and will never let him be under the Peril of a Forfeiture, because he will not comply with the Lord to give up his Right without Law.

But the Lord hath another, and a more proper Remedy; for he may bring an Action of Debt for the Fine thus imposed, which will try the Right; and is not so penal to the Copyholder, which Point was lately resolved: And that if a Copyholder had a probable Cause to induce him to believe that he ought not to pay the Fine demanded, (let the Right be as it would) yet no Ejectment will lie; for it must be only in a plain Case that the Lord can enter for a Forfeiture.

For

For no Man forfeits his Estate, but by a wilful Default in himself, such a Forfeiture as is done and presumed to be committed upon his own Knowledge, but Want of Understanding cannot be made a wilful Neglect. 'Tis true, the Decree in Chancery made here cannot vary the Law, but it may be Evidence of the Fact; for prima facie it shall be intended that such Values have been paid Time out of Mind, because the Court have so decreed; but then when the Fine was declared to be certain, a Doubt did arise how the Year's Value shall be reckoned, which has been settled also by another Decree, and from that Time all the respective Lords of this Manor have taken Fines according to that Value which is mentioned in the Survey, and this Lord himself hath taken Fines in Pursuance of the same, so that 'tis clear the Fine cannot be Arbitrary; but be it so or not, 'tis not material to this Purpose, because the Tenant hath a good and colourable Ground to insist upon the Decree and Survey, and consequently there is no wilful Forfeiture.

The Lord Chief Baron agreed, That if it be a Doubt, and the Tenant gives a probable Reason to make it appear that no more is due than what he is ready to pay, 'tis no Forfeiture; but the Law in general presumes that the Fine is incertain, if the contrary is not shewed. Now if the Tenant's Doubt did arise upon the Equitableness of the Fine, in such Case if he refuse to pay, 'tis a Forfeiture; but here it was, whether it shall be paid according to the computed or improved Value, and therefore he inclined that the Action would not lie.

The Exemplification of the Decree was offered to be read, which being opposed, Serjeant Maynard informed the Court, that nothing was more usual than to read a Sentence in the Ecclesiastical Court, or a Decree in Chancery, as Evidence of the Fact: It being allowed to be read, the Council for the Defendant took Notice, that the Commission was therein mentioned which was returned into Chancery, and burned when the Six Clerks Office was on Fire, in the Year 1618. But a Duplicate thereof was produced, which the Defendant had from the Heir of the Harveys, and so the Survey was prayed to be read; which was opposed by Sir William Jones, for he said that it was no Duplicate, the Commissioners Names being all written with one Hand, and no Proof being made that it was a true Copy of that which was returned: He likewise observed upon the reading of the Decree, that it was an Evidence for the Plaintiff, because if there had been a settled Rule for Payment of the Fines, there had been no Occasion to seek Relief in Equity, and that there was

was no Reaſon that the Defendant ſhould come into a Court of Law to prove ſuch Settlement by a Decree in Chancery, for if there be ſuch a Decree his Remedy is proper there; beſides, the Decree it ſelf only mentions the Year's Value, which was to be ſettled by the Commiſſioners, and which he ſaid was never done, ſo that the Decree which appointed the Commiſſion was not compleated, and therefore being but Executory, is of no Force even in Equity.

The Court were doubtful in the Matter, and Baron Thurland ſaid, That no Action of Debt would lie for this Fine, becauſe it was neither upon the Contract, nor as ex quaſi contractu: But as to that, Serjeant Maynard anſwered, That many Reſolutions had been made in his Time of Caſes, wherein the old Books were ſilent.

Upon the Whole, the Court thought this to be a proper Caſe for Equity, and ſo directed a Juror to be withdrawn, which was accordingly done.

DE

DE
Term. Sanctæ Trin.
Anno 29 Car. II. in Communi Banco.

Addiſon *verſus Sir* John Otway.

IN a Special Verdict in Ejectione firmæ, the Caſe was thus, Viz. There was the Vill of Rippon, and the Pariſh of the ſame Name; and likewiſe the Vill of Kirkby, and the Pariſh of the ſame Name, in the County of York. And Thomas Brathwaite being Tenant in Tail of the Lands in Queſtion, lying in the ſaid Pariſhes of Rippon and Kirkby; did by Bargain and Sale convey the ſame, lying (as in truth they did) in the Pariſhes of Rippon and Kirkby, to the Intent to make a Tenant to the Præcipe in order to ſuffer a Common Recovery, and thereby he did covenant to ſuffer the ſame, which Recovery was afterwards ſuffered of Lands in Rippon and Kirkby, but doth not ſay (as he ought) in the Pariſhes of Rippon and Kirkby; and the Verdict in effect found, That he had no Lands in the Vills; but farther, that it was the Intent of the Parties, that the Lands in the Pariſhes ſhould paſs; and whether they ſhould or not, was the Queſtion.

A Pariſh and a Vill within the Pariſh of the ſame Name; a Recovery is ſuffered of Lands in the Vill, and in the Deed to lead the Uſes, the Pariſh is named, they make but one Conveyance, and the Lands in the Pariſh do paſs. Mod. Rep. 250. 2 Ven. 31.

It was ſaid for the Defendant, That by this Indenture and Common Recovery the Lands which lie in the ſaid Pariſhes ſhall paſs.

1. Suppoſing this to be in the Caſe of a Grant, there if the Vill is only named, yet the Lands in the Pariſh of the ſame Name ſhall paſs, becauſe the Grant of every Man ſhall be taken ſtrongeſt againſt himſelf, Owen Rep. 61.

So where Part of the Lands lie in B. and the Grant is of all the Lands in D. all the Lands in the Pariſh of D. ſhall paſs, becauſe in that Caſe the Pariſh ſhall be intended; and if the

Postea, Baker *and* Keat.

Law be thus in a Grant a fortiori in the Case of a Common Recovery, which is the Common Assurance of the Land.

2. The Verdict hath found that the Defendant had no Lands in the Mills of Rippon and Kirkby, and the Court will not intend that he had any there, if not found; so that nothing passes by the Recovery, if the Lands in the Parishes do not pass, which is contrary to the Intention of the Parties, and to the Rules of Law in the like Cases; for if a Man deviseth all his Lands in Dale, and hath both Freehold and Leasehold there, by this Devise the Freehold only passes, but if no Freehold the Leases shall pass, Cro. Car. 293. So adjudged in the Case of Rose *and* Bartlet, for otherwise the Will would be void.

3. The Parish and Will shall be both intended to support a Trial already had; as where a Venire facias ought to issue from the Parish of Dale, and it was awarded from Dale generally, 'tis well enough, * 1 Roll. Rep. 27. A fortiori to support a Common Recovery, which has always been favourably interpreted, and yet a new Trial will help in the one Case, but a Man cannot command a new Recovery when he will; and therefore the Judges usually give Judgments to support and maintain Common Recoveries, that the Inheritances of the Subject might be preserved; for if there be Tenant in Tail, the Reversion in Fee, or if Baron and Feme suffer a Recovery, this is a Bar of the Reversion, and the Dower, and yet the intended Recompence could not go to either, Pl. Com. 515. 2 Roll. Rep. 67. 5 Co Dormer's Case.

*1 Roll. Rep. 21, 27, 293. Hob. 6. 2 Cro. 263.

Antea.

4. The Jury have found that the Intention of the Parties was to pass the Lands in the Parishes, which Intention shall be Equivalent to the Words omitted: And for that there is a notable Case in 2 Roll. Rep. f. 245. where the Intent of the Parties saved an Extinguishment of a Rent. The Case was, A. makes a Lease for Years, rendring Rent, and then grants the Reversion for 40 Years to B. and C. which he afterwards conveyed to them and their Heirs by Bargain and Sale, and covenanted to levy a Fine accordingly, to make them Tenants to the Præcipe, to suffer a Common Recovery to another Use; the Bargain, Fine, and Recovery were all executed, and it was adjudged that they made all but one Conveyance, and that the Reversion was not destroyed, and by consequence the Rent not extinguished; for though the Bargainor might intend to destroy the Reversion, by making this Grant to them and their Heirs, yet the Bargainees could never have such Intention, and though they were now seised to another Use, yet by the Statute of Wills, their former Right is saved which they had to their proper Use;

and

and their Intention being only to make a Tenant to the Præcipe, the Statute shall be so construed that the Intent of the Parties shall stand.

5. The Lands in the Parishes pass, because the Deed and Common Recovery make but one Conveyance and Assurance in the Law; and therefore as a Construction is not to be made upon part, but upon the whole Deed, so not upon the Deed or Recovery alone, but upon both together, 2 Co. 75. Lord Cromwell's Case. 1 Anders. 83.

6. 'Tis the Agreement of the Parties which governs Fines and Recoveries, and Lands shall pass by such Names as are agreed between them, though such Names are not proper; and therefore a Fine of a Lieu conus is good, though neither Vill or Parish is named therein, Poph. 22. 1 Cro. 270, 276, 693. 2 Cro. 574. Antea.

So if a Fine be levied of a Common of Pasture in Dale, 'tis good, though Dale be neither Vill or Hamlet, or Lieu conus out of a Vill, 2 Roll. Abr. f. 19. So in Sir George Symonds his Case, Lands as Parcel of a Manor were adjudged to pass, though in truth they were used with the Manor but Two Years; and the Reason of all these Cases is, because it was the Agreement of the Parties that they should pass. Cro. Car. 308. Winch. 122. Sid. 190, 191. Antea.

Object. If it be objected, That all these Authorities are in Cases of Fines, but the Case at Bar is in a Common Recovery, which makes a great Difference.

Answ. The Proceedings in both are amicable, and not adversary, and therefore as to this purpose there is no difference between them; and for an Authority in the Point, the Case of Lever *and* Hosier was cited, which was adjudged in this Court, Trin. 27 Car. 2. Where the Question was, whether upon a Common Recovery suffered of Lands in the Town of Sale or the Liberty thereof, Lands lying in Dale, being a distinct Vill, in the Parish of Sale should pass or not; and after divers Arguments it was allowed to be well enough, being in the Case of a Common Recovery: And so was the Case, Pasch. 16 Car. 2. in B. R. In a Special Verdict the Case was, That Sir Thomas Thinn being seised of the Manor of Buckland in Tail, and of Twenty Acres of Land, called and known by a particular Name, which Twenty Acres of Land were in Ed. the 6th's Time reputed Parcel of the said Manor, and always used with it; sold the said Manor and all the Lands reputed Parcel thereof, with the Appurtenances, of which he did suffer a Common Recovery; and it was adjudged upon great Consideration, that though the Recovery did not mention the Twenty Acres particularly, yet it did Antea. Sid. 190.

Dock the Entail thereof, because the Indenture which leads the Uses of the Recovery was of the Lands reputed Parcel thereof, or enjoyed with it, and that the Shortness in the Recovery was well supplied by the Deed; in which Case the Court were guided by the Resolution in Sir George Symond's Case. Vide 6 Co. Sir Moyle Finch's Case.

The Authorities against this Opinion are Two:

Antea, Lever *and* Hosier. 1. That of Stock *versus* Fox, Cro Jac. 120. There were Two Mills, Walton and Street in the Parish of Street, and a Fine was levied of Lands in Street; it was adjudged that the Lands in Walton did not pass by this Fine.

But there is another Report of this very Case, by my Lord Chief Justice Rolls in his Abr. tit. Grants 54. where 'tis said, If there be in the County of Somerset the Mill of Street, and the Mill of Waltham within the Parish of Street, and a Man being seised of Lands in the Mill of Street, and of other Lands in the Mill of Waltham, all within the Parish of Street; and he bargains and sells all his Lands in Street, and having covenanted to levy a Fine, doth accordingly levy it of Lands in Street, and doth not mention either in the Indenture or in the Fine any Lands in Waltham, the Lands lying there shall not pass; from which Report there may be a fair Inference made, That it was the Lord Rolls his Opinion, That if Waltham had been named in the Indenture, though not in the Fine, the Lands would have passed; and in this Case the Parishes are named in the Indenture of Bargain and Sale; but besides, in that Case the Party had Lands both in Street and Waltham, and so the Conveyances were not in vain, as they must be here if the Lands in the Parishes do not pass.

Antea. 2. The other Case is that of Baker *and* Johnson in Hutton 106.

But this Case is quite different from that, because there was neither Mill or Parish named in the Indenture; but here the Indenture was right, for the Lands are mentioned therein to lie in the Parishes, &c. And for these Reasons, Judgment was prayed for the Defendant.

This Case was afterwards argued in Michaelmas-Term following, by Serjeant Pemberton and Maynard for the Plaintiff; who said,

Ex parte Quer. That the Government of this Nation was Ecclesiastical and Civil; the Ecclesiastical runs by Parishes, and the Civil by Hills; That a Parish is constituted by the Ecclesiastical Power, and may be altered by the King and Ordinary of the Place; that the Parson was Superintendent of the Parish, and the Constable of the Hill, which was also constituted by the Civil Magistrate;

ſtrate; and from hence it is, that in real Actions which are adverſary, Lands ought not to be demanded as lying in a Pariſh, but within a Vill, that being the Place known to the Civil Juriſdiction; and if a Treſpaſs which is local be laid at Dale generally, there being both the Pariſh and Vill of Dale, the Proof of the Treſpaſs done in the Pariſh is not good, for it muſt be at the Vill.

They agreed, That in conveying of Lands a Fine or Common Recovery of Lands in a Pariſh or Lieu conus was good, 2 Cro. 574. But if there be both a Vill and a Pariſh of the ſame Name, and ſeverally bounded; if the Vill be only named without the Pariſh, nothing doth paſs but what is in the Vill, becauſe where a Place is alledged in Pleading it muſt be of a Vill, Moor 710. 2 Cro. 121. 1 Inſt. 125. b.

And this was the ancient way of demanding Lands in a Præcipe quod reddat, becauſe of the Notoriety of Vills from whence Viſnes do ariſe; and becauſe the Vill is more particular and of more Certainty than a Pariſh, and therefore 'tis requiſite that the Demandant ſhould be very particular in his Demand, that the Tenant may know how to make his Defence, and the Sheriff of what to deliver Poſſeſſion.

Beſides, a Vill is more Ancient than a Pariſh, and Lands have been demanded within them Time out of Mind, ſo that the Demand (when 'tis doubtful of what 'tis made) ſhall be ſuppoſed of that which is moſt Ancient; and ſuch Conſtruction is moſt conformable to the like Caſes, for Additio probat Minoritatem: And therefore if Father and Son are both of one Name, and Mention is made of one without an Addition of Junior, the Law intends the Father; ſo the Vill being more ancient than the Pariſh, that ſhall be intended if the Pariſh is not named.

In 2 Anderſon 124. Hartwel, Rode and Aſhen, were ſeveral Vills in the Pariſh of Rode the King granted all his Tythes in Rode and Aſhen in tenura Richardi Wake, and at the time of the Grant the Tythes of Hartwel were in the Tenure of Wake; it was adjudged in the King's-Bench that the Tythes in Hartwell did paſs, but that Judgment was reverſed in the Exchequer-Chamber, becauſe Rode could not be * intended a Pariſh and ſo to comprehend Hartwel, but muſt be intended a Vill diſtinct from a Pariſh, and ſo the Tythes of Hatwel being alſo a Vill, could not paſs by the Grant of them in Rode; this alſo was the Opinion of Popham, Owen 60. But Gawdy and Fenner were of another Opinion.

As to the finding of the Jury, that doth not help if the Recovery be not full, for they may expound, but they cannot enlarge

* In a *Præcipe* it muſt be intended a Vill if a Pariſh be not named, becauſe Vills are known at the Common Law, but not Pariſhes, thoſe were conſtituted by the Council of *Lyons*, but 'tis otherwiſe in Grants. Owen 61.

large each other; In a Formedon, nient compriſe in the Record, and not what is compriſed in the Deed, is the Plea. Things upon a Record are open to the View of all People; but a Deed is a Pocket-Record, and the Perſons whom it concerneth cannot come at the Sight of it: So Fines are open and to be ſeen by all, and are to be proclaimed, but according to this Interpretation Deeds ſhould be alſo proclaimed.

And there is a manifeſt Difference between Things contained in a Fine, and in a Deed; for a Fine of a Tenement is not good, but a Deed of a Tenement is well enough, but will not help the Fine; and therefore Men ſhould not go out of the Rules of the Law to help a Miſtake: For which Reaſons they prayed Judgment for the Plaintiff.

But the whole Court were of Opinion that the Lands in the Pariſhes did well paſs; for as Fines and Recoveries did grow in uſe, and are now become Common Aſſurances, they are to be favoured in the Law: And it hath been a Rule, That even in doubtful Things, Conſtructions ſhall be made to ſupport a Deed if poſſible, Ut res magis valeat quam pereat,' Co. Lit. 183.

By Rippon generally the Will ſhall be intended, but ſtabitur præſumptio donec probetur in contrarium, and that is proved by the Deed which ſhews where the Lands lie.

Indenture by an Infant to declare Uſes of a Fine or Recovery, make but one Conveyance, otherwiſe he might avoid it as he may a Deed by Infancy. Hob. f. 6. 2 Cro. 676.

Both the Indenture and Recovery being one Conveyance, muſt be expounded ſo that every Part may ſtand; beſides, 'tis apparent by the Intent of the Parties (which the Jury have alſo found) that the Lands in the Pariſhes ſhould paſs.

In the Caſe of Brock *and* Spencer a Treſpaſs was laid in Hurſly, and it was not ſaid whether Will or Pariſh; the Defendant pleaded that the Lands were held of the Manor of Marden in the Pariſh of Hurſly, &c. and the Venire facias was de Vicineto only, and not de Vicineto Parochiæ Hurſly, and it was adjudged good, for the Will and the Pariſh ſhall be underſtood to be the ſame.

And as to this Purpoſe they were all of Opinion, That there was no Difference between a Fine and Recovery: 'Tis true, the Law originally took notice of a Will only, becauſe the Diviſion of a County into Pariſhes was of Eccleſiaſtical Diſtribution; but now by Proceſs of Time that Diſtinction is taken notice of in Civil Affairs, and the Law hath great regard to the Uſage and Practice of the People, the Law it ſelf being nothing elſe but common Uſage, with which it complies, and alters with the Exigency of Affairs. It was but lately that the Curſitors would put the Word Pariſh into a Writ; for if a Note was delivered

to

to them of Lands in the Parish of Dale, they used always to make it of Lands in Dale, till the Court ordered them to do otherwise; so that though the Common Usage was so formerly, 'tis now otherwise, and the Reason of Things changing, the Things themselves also change.

And if this Recovery should not be construed to pass the Lands, the Intention of the Parties would fail; 'tis true, there is no Authority express in the Point to guide this Judgment, nor is there any against it; but if such should be, the Opinion of the Court is not to be bound against apparent Right; and 'tis for the Honour of the Law that Men should enjoy their Bargains according as they intended; for which Reasons, Judgment was given for the Defendant.

Goffe *versus* Elkin.

Affirmative Plea where it ought to be particular, where not.

The Condition of a Bond was, That if the Plaintiff shall seal to the Defendant a good and sufficient Conveyance in the Law of his Lands in Jamaica, with usual Covenants in such manner as by the Defendant's Council shall be advised; then if the Defendant should thereupon pay unto the Plaintiff such a Sum of Money, &c. the Condition should be void: In Debt brought upon this Bond, the Defendant (after Oyer of the Condition) pleads, that Mr. Wade a Councellor at Law, did advise a Deed of Bargain and Sale from the Plaintiff to the Defendant with the usual Covenants, of all his Lands in Jamaica, and tendred the Conveyance to the Plaintiff, who refused to seal the same, and so would discharge himself of the Condition, the Money being not to be paid unless the Assurance made.

To this Plea the Plaintiff demurred by Serjeant George Strode.

1. Because the Defendant hath not shewed the Conveyance, and an affirmative Plea ought to be particular, and not so general as this; for to plead generally quod exoneravit is not good, but it must be shewed how; and so it was adjudged in the Case of * Horseman *and* Obbins, where the Condition was to indempnify Lands from the yearly Rent of 20 l. during the Demise; the Defendant pleaded quod à tempore confectionis scripti obligatorii hucusque exoneravit, &c. And upon Demurrer as here, it was held no good Plea.

* 2 Cro. 165. 359, 363, 503, 634. Sid. 106. 2 Co. 4. a. Cro. Car. 383, 384. 2 Leon. 214.

2. The

2. The Matter of the Condition conſiſts both of Law and Fact, and both ought to be ſet out; the preparing of the Deed is Matter of Fact, and the Reaſonableneſs and Validity thereof is Matter of Law, and therefore they ought to be ſet forth that the Court may judge thereof.

* Hob. 107. * In 22 E. 4. 40. The Condition of a Bond was, That the Defendant ſhould ſhew the Plaintiff a ſufficient Diſcharge of an Annuity, who pleaded that he tendered a good and ſufficient Diſcharge in general without ſetting it forth; it was not good.

Mod. Rep. 67. 3. The Plea is, That the Indenture had the uſual Covenants, but doth not ſet them forth, and for that Cauſe 'tis alſo too general.

In 26 H. 8. 1. The Condition was for the Performance of Covenants; one whereof was, That he ſhould make ſuch an Eſtate to the Plaintiff as his Council ſhould adviſe: The Defendant pleaded, That he did make ſuch Conveyance as the Council of the Plaintiff did adviſe, and the Plea was held ill and too general, becauſe he ſhewed not the Nature of the Conveyance, and yet Performance was pleaded according to the Covenant.

But notwithſtanding theſe Exceptions, the whole Court were of Opinion that this Plea was good; for if the Defendant had ſet forth the whole Deed verbatim, yet becauſe the Lands are in Jamaica, and the Covenants are intended ſuch as are uſual there, the Court cannot judge of them, but they muſt be tried by the Jury.

He hath ſet forth that the Conveyance was by a Deed of Bargain and Sale, which is well enough; and ſo it had been if by Grant, becauſe the Lands lying in Jamaica paſs by Grant, and no Livery and Seiſin is neceſſary; if any Covenants were unreaſonable and not uſual, they are to be ſhewed on the other Side: And ſo Judgment was given for the Defendant.

Spring *verſus* Eve.

Verdict cures the miſ-recital of the Time of the Seſſion of Parliament. 3 Keb. 742, 813.

DEbt upon the Statute of 29 Eliz. cap. 4. by the Sheriff for his Fees for ſerving of an Execution: After Verdict for the Plaintiff, it was moved in an Arreſt of Judgment by Serjeant Pemberton, becauſe the Time of holding the Parliament was miſ-recited, being miſtaken in both the Statute-Books of Poulton and Keble as it appeared by the Parliament-Roll, whereupon Judgment was ſtayed till this Term; and the Court had Copies out of the Rolls of the Time when the Parliament was held,

held, and they were all clear of Opinion, that the Time was mistaken in the Declaration, and so are all the Precedents; for the Plaintiff here declared, that this Statute was made at a Session of Parliament by Prorogation held at Westminster, 15 Febr. 29 Eliz. and there continued 'till the Dissolution of the same; whereas in truth the Parliament began 29 Octob and not on the 15th of February; for it was adjourned from that Time to the 15th of February, and then continued 'till it was dissolved.

My Lord Coke in his 4th Institutes, fol. 7. takes Notice of this Mistake in the printed Books.

But the Court were all of Opinion, That though it was mistaken and ought to have bin otherwise, yet being after * Verdict 'tis well enough, and the rather because this is a particular Act of Parliament, and so they are not bound to take Notice of it; and therefore if it be mistaken, the Defendant ought to have pleaded Nul tiel Record; but since he hath admitted it by Pleading, they will intend that there is such a Statute as the Plaintiff hath alledged, and they could not judicially take Notice of the contrary. Curia.

* Dyer 95. Yelv. 127. 2 Cro. 111. pl. 9. Br. Abr. tit. Parl. 87.

The Serjeant perceiving the Opinion of the Court, desired Time to speak to it, being a new Point; and told the Court, that they ought to take Notice of the Commencement of private Acts, which the whole Court denied.

And the Chief Justice said, That they were not bound to take Notice of the Commencement of a general Act, for the Court was only to expound it; and though this had not bin in the Case of a particular Act (where 'tis clear the Defendant ought to plead Nul tiel Record) yet being after Verdict 'tis well enough, because the Party took no Benefit of it upon the Demurrer, and because of the Multiplicity of Precedents which run that way.

So in the Case upon the Statute of Tythes, though it be mistaken, yet it hath often bin held good; as if an Action be brought upon that Statute for not setting out of Tythes, declaring Quod cum Quarto die Novembris Anno Secundo Edw. 6. It was enacted, &c. and the Parliament began 1 Ed. 6. and was continued by Prorogation until 4 Novembris, yet this hath often bin held good, and Multitudo errantium tollit peccatum.

And though in this Case the Parliament was adjourned, but in that upon the Statute of Ed. 6. it was prorogued, yet the Chief Justice said, That as to this Purpose there was but little Difference between an Adjournment and a Prorogation; for an Adjournment is properly where the House adjourn themselves, and a Prorogation is when the King adjourns them.

But Justice Atkins doubted, whether the Court ought not to take Notice of the Commencement of a general Act, and could have wished that there had been no such Resolution as there was in the Case of Partridge *and* Strange in Pl. Commentaries; for that he was satisfied with the Argument of Serjeant Morgan in that Case, who argued against that Judgment, and held, That he who vouched a Record, and varies either in the Year or Term, hath failed of his Record: But since there had been so many Authorities since in Confirmation of that Case, he would say nothing against it.

But he held, that there was a manifest Difference between an Adjournment and a Prorogation; for an Adjournment makes a Session continue, but after a Prorogation all must begin de Novo; and that an Adjournment is not always made by themselves, for the Chancellor hath adjourned the House of Peers ex mandato Domini Regis; and Queen Elizabeth adjourned the House of Commons by Commission under the Great Seal.

4 Inst. 7.

Mires *versus* Solebay.

Servant shall not be charg'd in *Trover* for taking Goods by the Command of his Master.

IN a Special Verdict in Trover and Conversion, the Case was this: viz.

H. being possessed of several Sheep, sells them in a Market to Alston, but did not deliver them to the Vendee, and afterwards in that very Market they discharge each other of this Contract, and a new Agreement was made between them, which was, That Alston should drive the Sheep home and depasture them till such a Time, and that during that Time H. would pay him so much every Week for their Pasture; and if at the end of that Time (then agreed between them) Alston would pay H. so much for his Sheep (being a Price then also agreed on), that then Alston should have them.

Before the Time was expired H. sells the Sheep to the Plaintiff Mires, and afterwards Alston sells them to one Marwood, who brought a Replevin against the Plaintiff for taking of the Sheep; and the Officers, together with Solebay the Defendant (who was Servant

Servant to Marwood) did by his Order, and in Assistance of the Officers, drive the Sheep to Marwood's Grounds, where they left them.

The Plaintiff demands the Sheep of Solebay, and upon his Refusal to deliver them, brings this Action against the Servant; and whether it would lie or not, was the Question.

It was urged at the Bar, that the Action would not lie against the Defendant, because he had not the Possession of the Goods at the Time of the Action brought; for he presently put them into his Master's Ground: And it was said, if A. find Goods, and S. takes them away before the Action brought, Trover will not lie against A. but 'tis otherwise if he sell them.

In this Case it would have been a Breach of Trust in the Servant, to have delivered the Goods belonging to his Master to another: 'Tis true, if there be a Conversion, though the Possession be removed before the Action brought, yet the Action will lie, but that is because of the Conversion.

Many Cases were put where the Servant is not liable to an Action for a Thing done by the Command of his Master; and where a Bailiff, who is but a Servant to the Sheriff, shall not be charged in a false Return made by his Master, Cro. Eliz. 181. So if a Smith's Man pick an Horse, the Action lies against the Master, and not against the Servant. 1 Roll. Abr. 94, 95.

The Court, before they delivered any Judgment in this Case, premised these Two Things: viz.

1. That 'tis necessary in Trover to prove a Property in the Plaintiff, and a Trover and Conversion in the Defendant: And it was said by Justice Atkins, (but denied by the Chief Justice) That though Goods are sold in a Market, yet the Property is not changed 'till the Delivery; for which he cited Keilway 59, 77.

But the Court held clearly in this Case, that the first Sale to Alston was defeated by the Agreement of the Parties afterwards; for when a Bargain is made, and all the Parties consent to dissolve it, and other Conditions are proposed, the new Agreement destroys the former Bargain. And the Chief Justice said, That if an House was bought in a Market, for which the Vendee is to pay 10 l. if the ready Money be not paid the Property is not altered, but the Party may sell him to another.

2. This new Agreement to have the Sheep, if Alston would pay such a Sum of Money at a future Day, will not amount to a Sale, and the new Property is changed, and consequently the Sale by H. to the Plaintiff before the Day is good, and so the Property of the Sheep is in him.

But by the Opinion of the whole Court the Action would not lie against the Defendant.

1. The Defendant could be guilty of no Conversion, unless the driving the Cattle by vertue of the Replevin would make him guilty; but at that Time the Sheep were in Custodia Legis, and the Law did then preserve them so that no Property can be changed, and if so, then there could be no Conversion.

2. The Action will not lie against the Servant, for it being in Obedience to his Master's Command, though he had no Title, yet he shall be excused: And this Rule Justice Scoggs said would extend to all Cases where the Master's Command was not to do an appatent Wrong; for if the Master's Case depended upon a Title, be it true or not, 'tis enough to excuse the Servant; for otherwise it would be a mischievous Thing, if the Servant upon all Occasions must be satisfied with his Master's Title and Right before he obey his Commands; and 'tis very requisite that he should be satisfied if an Action should lie against him for what he doth in Obedience to his Master: But it was said, the *Servant cannot plead the Command of his Master in Bar of a Trespass; and it was likewise said, That in this Case the driving of the Cattle by the Servant to the Grounds of his Master, or a Stranger's helping to drive them without being requested, is justifiable.

* Wyne *and* Rider, antea.

3. Because what was done by the Defendant was done in Execution of the Process of the Law, and he might as well justifie as the Officer; for if he forbid the Defendant to have assisted him, yet his assisting him afterwards would not have made him guilty, because done in Execution of the Law.

4. Because 'tis not found that the Servant did convert the Sheep to his own Use; for the special Verdict only finds the Demand and the Refusal, which is no Conversion; and though 'tis an Evidence of it to a Jury, yet 'tis not Matter upon which the Court can give Judgment of a Conversion, 10 Co. 57.

2 Bulstr. 313. 1 Roll. Abr. 5. And therefore the Jury should have found the Conversion as well as the Demand and Refusal, like the Case in 2 Roll. Abr. 693. In an Assise of Rent-Serk, upon Nul tort pleaded, the Jury found a Demand and Refusal, & sic disseisivit; it was held to be no good Verdict, for the Demand ought to have been found on the Land, and shall not be so intended unless found.

The Plaintiff here hath set forth in his Declaration a Request to deliver; then a Refusal and Conversion too, which shews that they ought to be found, because distinct Things; and the finding of the Demand and Refusal was only a Presumptive, not a Conclusive

clusive Proof of the Conversion; and if the Jury themselves know that there was no Conversion, yet the Plaintiff hath failed in his Action; as if a Trover be brought for cutting Trees and carrying of them away, and the Jury know, that though the Defendant cut them down, yet they still lay in the Plaintiff's Close, this is no Conversion.

And though it hath been strongly insisted at the Bar, that the Court shall intend a Conversion, unless the contrary appeared, and are to direct a Jury to find the Demand and Refusal to be a Conversion, and the Opinion of Dodridge *and* Croke, in 1 Roll. Rep. 60. was much relied on, where Adams recovered against Lewis 40 l. in the Court of Exon, and Three Buts of Sack were taken in Execution, and the Plaintiff deposited 22 l. in the Hands of the Defendant to prevent the Sale of the Sack, which was to be a Pledge to return it upon Request, if the Defendant was not paid before the next Court Day; the Jury found the Debt was not paid, and that no Request was made to return the Sack, but that the Plaintiff requested the Defendant to return the Money: Yet it was held by those Two Justices, that the Law would supply the Proof of a * Conversion though it was not found, for it shall be presumed that the Money was denied to the Plaintiff, and that the Defendant might use it himself; and because no other Proof could be made, that very Denial shall be a Conversion in Law; so a Denial of a Rent-Seck after Demand is a Disseisin, much more in personal Actions where the Substance is found, 'tis well enough, 1 Inst. 282. a.

* Bulstr. 308. Cro. Eliz. 495. Goldsb. 152. Moor 460. Stiles 361. Pl. Com. 92. b.

But the Court said, That notwithstanding this Authority, they would not intend a Conversion, unless the Jury had found it, especially in this Case, because they ought to have found it to make the Servant liable, or if the Conversion was to the Use of his Master, there is no Colour for this Action to be brought against the Defendant, but it ought to be brought against the Master.

Whereupon a Ve. fa. de Novo was prayed to help the Insufficiency of the Verdict, the Conversion not being found; but the Court said, it was to no Purpose to grant a new Trial, unless the Plaintiff had a new Case; and so Judgment was given for the Defendant.

Bill

Bill *verſus* Nicholl.

Variance between the Record pleaded and the Record it ſelf.

IN an Action brought in the Court of Exchequer, the Defendant pleaded another Action depending againſt him for the ſame Matter in the Common-Pleas, and upon nul tiel Record replied by the Plaintiff, a Day was given to bring in the Record, and when it was brought in, it appeared that there was a Variance between the Record in the Common-Pleas, as mentioned in the Defendant's Plea, and the Record it ſelf; for the Defendant in his Plea had alledged one Gerrard to be Attorney inſtead of Gardiner, who was Attorney upon Record; and whether this was a Failure or not of the Record, was the Queſtion.

It was ſaid on the Defendant's Side, That it was ſuch a Variance, that it made it quite another Action; and on the Plaintiff's Side it was ſaid, That an immaterial Variance will not prejudice where the Subſtance is found, 7 H. 4. 1. Bro. Failure, pl. 2. 15. Curia adviſare vult.

Foreſt *qui tam, &c. verſus* Wire.

Action lies in the Courts at *Weſtminſter*, upon the Statute of 5 *Eliz.* but not an Information. 3 Cro. 316.

DEBT upon the Statute of 5 Eliz. cap. 4. for uſing the Trade of a Silk-Weaver in London, not having been an Apprentice Seven Years; the Action was brought in this Court, and laid in London, and tried by Niſi prius, and a Verdict for the Defendant; and now the Plaintiff to prevent the Payment of Coſts, moved by Mr. Ward againſt his own Action, and ſaid, That it will not lie upon this Statute in any of the Courts of Weſtminſter; for 'tis not only to be laid (as here) in the proper County, but 'tis to be brought before the Juſtices in their Seſſions, and this is by force of the Statute made 31 Eliz. cap. 4. and 21 Jac. cap. 4. which enacts, That all Informations upon Penal Statutes muſt be brought before the Juſtices of the Peace, in the County where Fact was committed.

* 2 Cro. 178. Stiles 383. By the Opinion of Rolls, Cro. Car. 112.

But the Court were clear of *Opinion, That the Action may be brought in any of the Courts of Weſtminſter, who have a concurring Juriſdiction with the Juſtices, and ſo they ſaid it hath been often reſolved.

Attorney

Attorney-General *verſus* Alſton.

AN Inquiſition upon an Accompt ſtated went out to inquire what Lands one Havers had in the Twentieth Year of this King, or at any Time ſince, he being the Receiver-General in the Counties of Norfolk and Huntingdon.

The Jury found that he was ſeiſed of ſuch Lands, &c. whereupon an Extent goes out to ſeiſe them into the King's Hands, for Payment of 1100 l. which he owed to the King.

Alſton the Tertenant pleads, That Havers was indebted to him, and that he was ſeiſed of thoſe Lands in 20 Car. 2. which was before the Debt contracted with him, and that he became a Bankrupt likewiſe before he was indebted to the King, and thereupon theſe Lands were conveyed to the Defendant by Aſſignment from the Commiſſioners of Bankrupcy for the Debt due to him from Havers, abſque hoc that he was ſeiſed of theſe Lands at the Time he became indebted to the King.

Where the King's Title is not precedent to that of the Tertenant, the Lands of his Receiver ſhall not be liable by the Statute of 13 *Eliz.*

The Attorney-General replies, That he was ſeiſed of theſe Lands before the Commiſſion of Bankrupcy iſſued, and before he became a Bankrupt, and that at the Time of his Seiſin he was Receiver, and accountable for the Receipt to the King, and being ſo ſeiſed in the 20th Year of this preſent King, he was found in Arrear 1100 l. for the Payment whereof he was chargeable by the Statute of the 13 Eliz. cap. 4. Which ſubjects all the Lands of a Receiver which he hath or ſhall have in him during the Time he remains accomptable, and ſo prays that the King's Hands may not be amoved: To this the Defendant demurred.

And Sawyer for him held, that the Replication was ill both in Form and Subſtance.

1. It doth not appear that the Defendant continued Receiver from the Time he was firſt made, as it ought to be, or elſe that he was Receiver during his Life; for if a Man is Receiver to the King, and is not indebted but is clear, and ſells his Land and ceaſes to be Receiver, and afterwards is appointed to be Receiver again, and then a Debt is contracted with the King, the former Sale is good.

2. The Replication is a Departure from the Inquiſition, which is the King's Title, for the Lands of which Inquiry was to be made, were ſuch which Havers had 20 Car. 2. And the Defendant ſhews, that Havers was not then ſeiſed thereof, but makes a good

a good Title to himself, by Indenture of Bargain and Sale made to him by the Commissioners of Bankrupcy, and so the Attorney-General cannot come again to set up a Title precedent to the Defendant, for that is a Departure; 'tis enough for the Defendant that he hath avoided the King's Title, as alledged; and though Mr. Attorney is not bound to take Issue upon the Traverse, yet he cannot avoid waving both the Title of the Defendant and the King, by insisting upon a new Matter.

It was agreed, That the King had Two Titles, and might either have brought his Inquisition grounded upon the Debt stated, or upon the Statute of the 13th of Eliz. upon Havers his becoming Receiver; but when he hath determined his Election, by grounding it upon the Debt stated, he cannot afterwards have Recourse to the other Matter, and bring him to be liable from the Time of his being Receiver; as if an Inquisition goes to inquire what Lands the Debtor of the King had such a Day when he entred into a Bond, if there be an Answer given to that, Mr. Attorney cannot afterwards set up a precedent Bond, because 'tis a Departure, and the Statute it self vests no Estate in the King, but makes the Receivers Lands liable as if he had entred into a Statute Staple.

The Inquisition therefore should have been grounded upon the Statute, and then the Defendant might have pleaded the Act of Indempnity, of which he might have the Benefit; but if not, he may be let into the Equity of the Statute of the 33 H. 8. cap. 39. which gives Liberty to Purchasers to have Contribution, and to plead sufficient Matter, if they have any in Discharge of the Debt.

Ex parte Quer. But on the other Side it was said, That the Replication was good; for if the Sale was after his being Receiver, though before he became indebted, yet by the Statute of 13 Eliz. the Lands are subject to a Debt contracted afterwards, because it hath a Retrospect to the Time he was first Receiver.

Pl. Com. 321. Dyer. 160. By the Common Law, both the Body and Lands of the King's Debtor were liable from the Time he became indebted; but because such Debtors oftentimes sold those Lands which they had whilst they were Officers, and so the King was defeated, therefore was this Statute made to supply that Defect of the Common Law, by which Statute all the Lands he had at any Time during his Continuance in the Office were made liable.

And though it may be objected, that because of this Inquisition the King is limited to a Time, viz. That Inquiry should be made

made what Lands Havers had in the 20th Year of the King, yet it was said the Inquiry may be general.

The Elegit anciently left out the Time, because the Law doth determine from what Time the Party doth become liable; so that the Question is about the King's Title, which if it appear to precede that of the Tertenant, then the King's Hands are not to be amoved; and thereupon Judgment was prayed for him, Bro. Prerogative 59. Curia adversare vult.

Barker *versus* Keat.

Reservation of a Pepper-Corn a good Consideration to raise an Use to make a Tenant to the *Præcipe*. Mod. Rep. 262.

IN a Special Verdict in Ejectione firmæ, the Jury made a special Conclusion by referring to the Court, Whether there was a good Tenant to the Præcipe or not, which was made by a Bargain and Sale, but no Money paid, nor any Rent reserved, but that of a Pepper-Corn, to be paid at the End of Six Months upon demand, and the Release and Grant of the Reversion thereupon was only for divers good Considerations.

The Question was, If this Lease upon which no Rent was reserved, but that of a Pepper-Corn, be executed by the Statute of Uses or not, if it be, then there is no need of the Entry of the Lessee, for the Statute will put him in actual Possession, and then the Inheritance by the Release or Grant of the Reversion will pass.

Cro. Jac. 604. Jones 7. 1 Cro. 110. 5 Rep. 124. b.

But if this Lease be not within the Statute, because no Use can be raised for want of a Consideration, then it must be a Conveyance at the Common Law, and so the Lessee ought to make an actual Entry, as was always usual before the making of the Statute.

Lit. Sect. 465. Co. Lit. 46. b.

Serjeant Waller and Maynard argued, that here was no Consideration to raise an Use, for the Reservation of a Pepper-Corn, is no Profit to the Lessor, 'tis not a real and good Rent; for so small and trivial a Matter is no Consideration, for that which must be a good Consideration ought to be Money, or some other valuable Thing.

Then this Conveyance is not executed by the Statute of Uses, and if so, 'tis not good at the Common Law, it being only a Lease for Years, and no Entry, without which there can be no Possession, and if not, then there can be no Reversion upon which the Release may operate, 'tis only an interesse termini, and so was the Opinion of my Lord Coke since the *making of this Statute. *Co. Lit. 270.

1 Leon. 194, 195. And that no Use was raised here, the Case of my Lord Paget was cited, to which this was compared; My Lord being seised in Fee, covenanted to stand seised to the Use of Trentham and others, in Consideration of Payment of his Debts out of the Profits of his own Estate; this was adjudged a void Use, because there was no Consideration on Trentham's Part to raise it, the Money appointed to be paid being to be raised out of the Profits of my Lord's Estate.

The Words of the Lease are, Demise, Grant, &c. which are Words at the Common Law, Co. Lit. 45. b. and 'tis not possible that a future Executory Consideration should raise a present Use, for the Pepper-Corn is not to be paid 'tis the end of Six Months; and as this Consideration is Executory, so it is Contingent too, for the Lessor might have released before the Expiration of the Six Months.

*Cro. Jac. 604. pl. 32. If the Case of * Lutwitch and Mitton be objected, where it was resolved by the Two Chief Justices and Chief Baron, That upon a Deed of Bargain and Sale of Lands, where the Bargainee never entred, and the Bargainor reciting the Lease, did grant the Reversion expectant upon it; that this was a good Grant of the Reversion, from which the Possession was immediately divided, and was executed and vested in the Bargainee, by vertue of the Statute of Uses.

Cro. Car. 110, 400.

This is no Objection to the Purpose, because in that Case the Bargainor was himself in actual Possession.

So that if there be no good Tenant to the Precipe in this Case, though all that join in it are estopped to say so, yet the Tenant in Tail who comes in above, is not barred, 5 H. 5. 9.

But on the other Side it was said, That the Lessee was in Possession by the Statute, for the Word Grant being in the Lease, and the Reservation being a Pepper-Corn, that will amount to a Bargain and Sale, though it hath not those precise Words in it, 8 Co. 94.

Pl. Com. 308. Dyer 146. b. *contra.* But if it should not, yet another Use may be averred than what is in this Lease, like Bedel's Case, 7 Co. 40. b. Where a Man, in Consideration of Fatherly Love to his eldest Son, did covenant to stand seised to the Use of him in Tail, and afterwards to the Use of his second Son; there, though the Consideration respected his eldest Son only in Words, yet a Consideration which is not repugnant to it may be averred; and though an Entry is not found, yet it shall not be intended, since the Jury have not found the contrary.

North

North, Chief Justice: At first when this sort of Conveyance was used, the Lessee upon the Lease for a Year did always make an actual Entry, and then came the Release to convey the Reversion; but that being found troublesome, the constant Practice was to make the Lease for a Year, by the Deed of Bargain and Sale, for the Consideration of Five Shillings, or some other small Sum; and this was held and is so still to be good without any actual Entry, and the Bargainee thereby is capable of a Release, (though he cannot bring an Action of Trespass without Entry) for when Money is the Consideration of making the Bargain and Sale, 'tis executed by the Statute of Uses, and so the Release upon it is good; but if the Deed be not executed, 'tis otherwise. 2 Cro. 604.

But this being to support a common Recovery, was to be favoured; and therefore the Court took Time to consider 'till the next Term: And then Antea Addison *and* Otway

The Chief Justice said, That if a real Action be brought against A. who is not Tenant to the Præcipe, and a Recovery be had against him, the Sheriff can turn him out who is in Possession; but if he who is not in Possession comes in by Voucher, he is estopped to say afterwards that he was not Party to the Writ, so that he who is bound must be Tenant or Vouchee, or claim under them.

Conveyances have been altered, not so much by the Knowledge of the Learned, as by the Ignorance of unskilful Men in their Profession.

The usual Conveyance at Common Law, was by Feoffment, to which Livery and Seisin were necessary, the Possession being given thereby to the Feoffee; but if there was a Tenant in Possession, and so Livery could not be made, then the Reversion was granted, and the particular Tenant always attorned, and upon the same Reason it was that afterwards a Lease and Release was held a good Conveyance to pass an Estate, but at that Time it was made no Question but that the Lessee was to be in actual Possession before the Release. Antea Lord *Salisbury's* Case.

Afterwards Uses came to be frequent, and Settlements to Uses were very common, by Reason whereof many Inconveniencies were introduced; to prevent which the Statute of the 27th of H. 8. was made, by which the Use was united to the Possession; for before that Statute, Uses were to be executed according to the Rules of Equity, but now they are reduced to the Common Law, and are of more Certainty, and therefore are to be construed according to the Rules of Law.

Cro. Car. 110.

At the Common Law, when an Eſtate did not paſs by Feoffment, the Leſſor or Vendor made a Leaſe for Years, and the Leſſee actually entred, and then the Leſſor granted the Reverſion to another, and the Leſſee attorned, and this was good.

Afterwards when an Inheritance was to be granted, then alſo was a Leaſe for Years uſually made, and the Leſſee entred as before, and then the Leſſor releaſed to him, and this was good.

But after the Statute of Uſes, it became an Opinion, That if a Leaſe for Years was made upon a valuable Conſideration, a Releaſe might operate upon that without an actual Entry of the Leſſee, becauſe the Statute did execute the Leaſe, and raiſed an Uſe preſently to the Leſſee. Sir Francis Moor, Serjeant at Law, was the firſt who practiſed this Way.

Nota.

But becauſe there were ſome Opinions, that where Conveyances may enure Two Ways, the Common Law ſhall be preferred, unleſs it appear that the Party intended it ſhould paſs by the Statute; thereupon the uſual Courſe was to put the Words Bargain and Sale into the Leaſe for a Year, to bring it within the Statute, and to alledge that the Leaſe was made to the Intent and Purpoſe that by the Statute of Uſes the Leſſee might be capable of a Releaſe; but notwithſtanding this, Mr. Noy was of the Opinion, That this Conveyance by Leaſe and Releaſe could never be maintained without the actual Entry of the Leſſee.

This Caſe goes farther than any that ever yet came into Judgment, for Money is not mentioned here to be the Conſideration, or any Thing which may amount to it, unleſs the Pepper-Corn, which he held to be a good Conſideration.

The Leaſe and Releaſe are but in nature of one Deed, and then the Intent of the Parties is apparent that it ſhould paſs by the Statute, and eo Inſtanti that the Leaſe is executed, the Reſervation is in Force.

The Caſe put by Littleton, in Sect. 459, is put at the Common Law, and not upon the Statute; where he ſaith, That if a Leaſe be made for Years, and the Leſſor releaſeth all his Right to the Leſſee before Entry, ſuch Releaſe is void, becauſe the Leſſee had only a Right and not the Poſſeſſion, which my Lord Coke, in his Comment upon it, calls an intereſſe Termini, and that ſuch Releaſe ſhall not enure to enlarge the Eſtate without the Poſſeſſion, which is very true at the Common Law, but not upon the Statute of Uſes.

Cro. Car. 110.

And

And therefore Judgment was given by the whole Court, That the Word Grant in the Leaſe will make the Land paſs by way of Uſe; that the Reſervation of a Pepper-Corn was a good Conſideration to raiſe an Uſe to ſupport a Common Recovery; that this Leaſe being within the Statute of Uſes, there was no need of an actual Entry to make the Leſſee capable of the Releaſe; for by vertue of the Statute he ſhall be adjudged to be in actual Poſſeſſion, and ſo a good Tenant to the Præcipe; and Judgment was given accordingly in Michaelmas Term following. Judgment. 2 Vent. 32.

Kendrick *verſus* Bartland.

THE Plaintiff brought an Action on the Caſe for ſtopping the Water going to his Mill with a Continuando, &c.

The Defendant pleads, that the ſtopping was contra Voluntatem, and that Tali Die, which was between the firſt and the laſt Day laid in the Continuando, the Plaintiff himſelf had abated the Nuſance, and ſo he had no Cauſe of Action.

Continuando laid after a Nuſance abated, yet Damages ſhall be recovered for what was done before.

To this Plea the Plaintiff demurred; and Serjeant Baldwyn, who argued to maintain the Plea, did not rely upon that Part of it where the Defendant ſaith, That the ſtopping of the Water was involuntary, becauſe he doing the Thing it could not be contra Voluntatem; but the Queſtion would be, whether the Plaintiff had any Cauſe of Action to recover Damages after the Abatement of the Nuſance? And he ſaid, That he had abated it before the Action brought, and counted for Damages after the Abatement, for which he had no Cauſe of Action; and this he had confeſſed by his Demurrer.

But the Court were of Opinion, that it was not a good Plea, and took this Difference between a Quod permittat, or an Aſſize for a Nuſance, and an Action on the Caſe for the ſame; for the end of a Quod permittat, or an Aſſize, was to abate the Nuſance, but the end of an Action on the Caſe was to recover Damages; therefore though the Nuſance was removed, the Plaintiff is intituled to his Damages that accrued before; and 'tis uſual in Actions on this Nature, to lay the * Continuando for longer Time than the Plaintiff can prove, but he ſhall have Damages for what he can prove, and ſo here he ſhall recover the Damages which he ſuſtained before the Abatement: And thereupon Judgment was given for the Plaintiff. 2 Cro. 207, 618. * Sid. 319.

Walwyn

Walwyn *verſus* Awberry *and others.*

Tythes of a Rectory ſhall not be ſequeſtred for Repairs of the Chancel. Mod. Rep. 258.

TRelpaſs for the taking and carrying away of Four Loads of Wheat, and Four Loads of Rye, &c.

The Defendants juſtifie, for that the Plaintiff is Rector of the Rectory Impropriate of B. and that the Chancel was out of Repair, and that the Biſhop of Hereford, after Monition firſt given to the Plaintiff, had granted a Sequeſtration of the Tythes of the Rectory for the Repairing of the Chancel; and that the Defendants were Church-wardens of the Pariſh; and that the Particulars mentioned in the Declaration were Tythes belonging to the Plaintiff as Rector aforeſaid; and that by Vertue of the ſaid Commiſſion they took the ſame for Repairing of the ſaid Chancel, and that for theſe Tythes ſo taken they had accounted to the Biſhop.

To this the Plaintiff demurred.

The Queſtion was, Whether an Impropriate Rectory be chargeable for the Repairs of the Chancel by the Sequeſtration of the Tythes by the Biſhop? And thoſe who argued in the Negative for the Plaintiff could not deny, but that Church-Reparations did belong to the Eccleſiaſtical Courts, and that as often as Prohibitions have been prayed to that Juriſdiction, Conſultations have been as often granted; notwithſtanding in many Caſes the Rates for ſuch Reparations have been very unequally impoſed, and the Reaſon is, becauſe thoſe Courts have original Juriſdiction of the Matter.

It was admitted alſo, that Pariſhioners are bound to repair the Church, and the Rector the Chappel, and in this Reſpect of their Lands; and therefore if a Man hath Lands in one Town and dwell in another, he ſhall be contributary to the Reparation of that Church where the Lands are, and not where he inhabits.

And that all this was by the common Cuſtom of England long before the making of the Statute of 31 H. 8. cap. 13. by which Parſonages were made Lay-Fees; but then it muſt be underſtood that this was no real Duty incumbent upon them, but was a perſonal Burden for which every Pariſhioner was chargeable proportionably to the Quantity of Land which he held in the Pariſh; in which Caſe if he refuſed to be contributary, the Ordinary did never intermeddle with the Poſſeſſions, but always proceeded by Eccleſiaſtical Cenſures, as Excommunication of the Party refuſing, which is the proper Remedy.

But

But in case of an Appropriation in the Hands of an Ecclesiastical Corporation, as Dean and Chapter, &c. there if a Refusal be to contribute to the Repairs, the Ordinary may sequester; and the Reason is, because a Corporation cannot be excommunicated.

The Ordinary may also sequester in Things of Ecclesiastical Cognizance, as if the King do not present; so he may take the Profits within the Six Months that the Patron hath to present, and apply them to the Pastor of the Church by him recommended, because the Ordinary hath a Provisional Superintendency of the Church; and there is a necessity that the Cure should be supplied until the Patron doth present, and this is a kind of Sequestration.

But in some Cases the Ordinary could not sequester the Profits belonging to Spiritual Persons, though he was lawfully entituled to them for a particular Time and Purpose: For by the Statute of 13 Eliz. cap. 20. 'tis enacted, That if a Parson make a Lease of his Living for a longer Time than he is resident upon it, that such Lease shall be void, and he shall for the same lose one Years Profits of his Benefice, to be distributed by the Ordinary amongst the Poor of the Parish.

Now he hath no Remedy to recover the Years Profits, but in the Ecclesiastical Court; he could not sequester, and to give him Authority so to do, a Supplemental Statute was made Five Years afterwards, in the 18th Year of the Queen's Reign, cap. 11. by which, Power is given him to grant a Sequestration; so that if he could not sequester in a Case of which he had a Jurisdiction by a precedent Statute, à fortiori he cannot in a Case exempted as this is from his Jurisdiction.

But admitting a Sequestration might go, then this Inconvenience would follow, that if other Lands should be sequestred for the same Purpose, the former Sequestration could not be pleaded to discharge them, because the Interest is not bound thereby, no more than a Sequestration out of Chancery is pleadable to an Action of Trespass at the Common Law.

This Case cannot be distinguished from that of Jefferies in 5 Co. and from what the Civilians testified to the Court there, viz. That the Church-wardens and greater part of the Parishioners, upon a general Warning given, may make a Taxation by Law, but the same shall not charge the Land, but the Person in respect of his Land; so that 'tis he that is chargeable, and may be excommunicated in case of Refusal to contribute, but his Lands cannot be sequestred, because 'tis not the Business of the Ordinary to meddle with the Temporal Possessions of Lay-men, but to proceed against them by Ecclesiastical Censures; and the Parishioners

Lands

Lands may be as well sequestred for the Repairs of the Church, as the Lands of the Impropriator for the Repairs of the Chappel; for which Reasons it was held, that a Sequestration would not lie.

Ex parte Def. But on the other Side it was said, That before the making of the Statute the Rector was to repair the Chancel under pain of Sequestration, which the Ordinary had Power to grant in case of Refusal; and that his Authority in many Cases was not abridged by the Statute: The Case of *Parry *and* Banks was cited, where in the 24th Year of H. 8. a Parsonage was appropriated to the Deanary of St. Asaph, and a Vicaridge endowed, which the Bishop dissolved in the 24th Year of Queen Elizabeth, and Parry pretending, that notwithstanding this Dissolution it was in the King's Hands by lapse obtained a Presentation; and it was resolved that after the Statute of Dissolutions, which made Parsonages Lay-Fees, the Ordinary could not dissolve the Vicaridge where the Parsonage was in a Temporal Hand, but being in that Case in the Hands of the Dean, he might.

*2 Cro. 518.

The Rector is to repair the Chancel, because of the Profits of the Glebe, which is therefore Onus reale impositum Rebus & Personis; and of that Opinion was Johannes de Atkin, who wrote 100 Years before Lynwood, where in fol. 56 he saith, That if the Chancel was out of Repair, it affected the Glebe.

And that the Constitution of the Canon Law is such will not be denied, and if so Canons being allowed, are by Use become Parcel of the Common Law, and are as much the Law of the Kingdom as an Act of Parliament, for what is Law doth not Suscipere Magis aut Minus.

Vaugh. 327.

Several Cases were put where the Bishop doth intermeddle with the Profits of a Parsonage, as in the Case of a Sequestration upon a Judgment obtained against a Spiritual Person, where a Fi' Fa' is directed to the Sheriff upon that Judgment, and he returns Clericus beneficiatus non habens Laicum feodum; for which Reason he cannot meddle with the Profits of the Glebe, but the Bishop doth it by a Sequestration to him directed.

He may likewise retain for the supply of the Cure, and pay only the Residue, which hath bæn omitted on the other Side.

As the Ordinary might dissolve a Vicaridge endowed where the Parsonage was in the Hands of a Dean, so he may sequester an Appropriation in any Spiritual Person; and there is no Statute which exempts an Impropriation from such a Sequestration, because 'tis Onus reale at the Common Law; and as the Lay Impropriator may sue for Tythes and receive them as before the making

making this Statute; 'tis as reasonable since he hath the same Advantage, that he should have the same Charge, and the rather because the saving in the Statute of 31 H. 8. cap. 13. doth still continue the same Authority the Bishop had before, though the Possession was thereby given to the King.

The Words of which are, viz. Saving to all and every Person, &c. such Right which they might have had as if the Act had not been made, which must be the Right of the Ordinary, and of no other Person.

An Impropriator pays Synodals and Procurations as well as an Appropriation in the Hands of Ecclesiastical Persons, and it would be very inconvenient if a Sequestration should not lie, which would quicken them more than an Excommunication; and it was said, That in England there were above 1000 Appropriations belonging to Corporations aggregate, as Deans and Chapters, which could not be excommunicated; and if the Bishop could not sequester, then there was no Remedy to repair the Chancel: For which Reasons, Judgment was prayed for the Defendant.

But the whole Court, besides Justice Atkins, held, That the Lay-Impropriation was not to be sequestred for the Repairs of the Chancel: And the Chief Justice said, That the Repair of the Chancel was an Ecclesiastical Cause, but that the Rectory and Impropriator were Lay, and not to be sequestred, as the Possessions in the Hands of Ecclesiastical Corporations may, which he did agree could not be excommunicated, but the Persons who made up such Corporation might.

And as to the Sequestration upon a Judgment, it made nothing for the Matter to entitle the Ordinary to a Sequestration in this Case, because what he doth in that is in the Nature of a Temporal Officer; for the Sequestration is like the Fieri Facias, and being directed to the Bishop, he is in that Case (if he may be so called) an Ecclesiastical Sheriff, and by Vertue thereof may do as the Sheriff doth in other Cases, that is, he may seise Ecclesiastical Things, and sell them, as the Sheriff doth Temporal Things upon a Fieri Facias; but 'tis to be observed, that he must return Fieri feci, and not Sequestrari feci upon this Writ.

And as to the Saving in the Statute, that doth not alter the Case; for if any Right be thereby saved, 'tis that of the Parson, for the Parishioners have no Right to sit there; indeed the Vicar may, because he comes in under the Parson.

So that this Case is not to be put as at the Common Law, but upon the Statute of Dissolutions, by Vertue whereof the

Rectory being in the hands of a Lay-Person is become a Lay-Fee, and so cannot be subject to a Sequestration; if it should, the next Step would be, that the Bishop would increase Vicaridges as well in the Case of an Impropriation as Appropriation, which would lessen the Possessions of such as have purchased under the Act.

But Justice Atkins was of a contrary Opinion; he said, That it was agreed by all, that an Impropriator is chargeable with the Repairs of the Chancel; but the Charge was not personal but in Regard of the Profits of the Impropriation, which are originally the Debtor according to the first Donation. That the primary Rights of Rectories are the Performance of Divine Service and the Repairs of the Chancel, and that the Profits which are over and above must then go to the Impropriator, and are to be esteemed then a Lay-Fee; but that those Duties are the first Rights, and therefore must be first discharged.

That this Right, this Duty of Repairing, was certain, and therefore shall not be taken away by Implication, but by express Words in the Act, which if wanting shall remain still, and the Parties shall be compelled to repair under the same Penalties as before.

But admitting it should be taken away, yet the saving in the Act extends to the Right of the Parishioners, which is not to sit in the Chancel, but to go thither when the Sacraments are administred, of which they are deprived when 'tis out of Repair; nor can they have the Use of the Church which properly belongs to them, because when the Chancel is out of Repair, it not only defaces the Church, but makes it in a short Time become ruinous.

He denied that a Sequestration in Chancery cannot be pleaded to bar a Trespass at the Common Law; for if it be said that the Chancery have issued such Sequestrations, it will be as binding as any other Process issuing according to the Rules of the Common Law.

And he also denied the Case put by the Chief Justice, that the Lands of the Parishioners might as well be sequestred for the Repair of the Church, as those of the Impropriator for Repair of the Chancel, because the Profits of the Rectory might originally be sequestred, but the Lands of the Parishioner could not; and so the Cases are quite different.

Judgment. But in Easter Term following, Judgment was given against the Defendant upon the Point of Pleading, which the Court all agreed to be ill.

1. The

1. The Defendants should have averred, that the Chancel was out of Repair. 1 Ven. 35.

2. That no more was taken than what was sufficient for the Repair thereof. 1 Mod. 261. 1 Ven. 35.

3. For that the Plaintiff had declared for the taking of several Sorts of Grain; and the Defendant justifies the taking but of Part, and saith nothing of the Residue, and so 'tis a Discontinuance; and the general Words, quoad residuum transgressionis, will not help, because he goes to Particulars afterwards, and doth not enumerate all; and thereupon Judgment was given accordingly.

Edwards *versus* Weeks.

Parol Discharge good before Breach of Promise, but not afterwards. Mod. Rep. 262. *Cro. Car. 383. Sid. 293.

Assumpsit. The Plaintiff declared, That the Defendant, in Consideration that the Plaintiff at his Request had exchanged Horses with him, promised to pay him 5 l. and he alledged a Breach in the Non-performance.

The Defendant pleads, That the Plaintiff, before any Action brought, discharged him of his Promise: And upon a Demurrer, the Question was, Whether after a Breach of a Promise, a Parol Discharge could be good? The Case of *Langden and Stokes was an Authority, that such a Discharge had been good before the Breach: viz. The Defendant promised to go a Voyage, the Breach was alledged in Non-performance; and the Defendant pleaded, that before any Breach the Plaintiff exoneravit eum; and upon Demurrer it was held good before the Breach.

But here was no Time agreed for the Payment of this 5 l. and therefore it was due immediately upon Request, and not being paid, the Promise is broken, and the Parol Discharge cannot be pleaded; and of that Opinion was all the Court, and Judgment for the Plaintiff, Nisi, &c.

Quære. If he had pleaded such a Discharge before any Request of Payment, Whether it had been good?

Arris & Arris *versus* Stukely. *In Scaccario.*

Indebitatus assumpsit will lie for the Receipt of the Profits of an Office, tho' no Contract.

INdebitatus assumpsit for 200 l. in Money had and received to the Use of the Plaintiffs: Upon Non assumpsit pleaded, the Jury find a Special Verdict to this Effect; viz. They find that King Charles the Second did on the 17th Day of August, in the 12th Year of his Reign, by his Letters Patents under the Great Seal, grant unto the Defendant and another the Office of Comptroller of the Customs at the Port of Exceter, durante beneplacito: That the other Person died; and that the King afterwards by other Letters Patents, bearing Date primo Maii, in the 21st Year of his Reign, did grant the said Office to the Plaintiffs, which was Two Years before this Action brought; and that the Defendant still, and for Seven Years past, had exercised the same upon Pretence of a Right by Survivorship, and received the Profits thereof: But whether upon the whole Matter the Defendant made any such Promise as in the Declaration, they did not know, Et petunt advisamentum Curiæ in præmissis; and if upon the Matter so found the Court shall be of Opin on that the Defendant made such Promise, then they say that he did make such Promise, and assess Damages Occasione præmissorum in narratione mentionat' ad 100 l. and Costs to 53 s. and 4 d. &c.

Winnington Solicitor argued, That the first Patent was determined by the Death of one of the Patentees, and then the second Patent takes Effect, and so the Plaintiffs have a good Title; for there shall be no Survivorship of an Office of Trust, no not if the Office had been granted to Two for their Lives, if it be not said, to the Survivor of them, 11 Co. 34. Auditor Curle's
1 Mod. 187. Case; and of that Opinion was the Court clearly.

But Pollexfen for the Defendant said, That he agreed that Point, but that the Plaintiff's Patent was not good; for though there be a general Non obstante of all the Statutes in it, yet there ought to have been one in particular against the Statute of 14 R. 2. cap. 10. which enacts, That no Customer or Comptroller
31 H. 6. c. 5. shall have any Office in the Customs for his Life, but only during the Pleasure of the King; which being made for the publick Good, the King cannot by any Non obstante dispense with it.

In

In many Cases the Dispensation of the King by a Non obstante is good; as where a Statute prescribes the Form of the King's Grant, where it doth not directly prohibit a Thing, but only under Pain of a Forfeiture; but if it be direct, and pro bono publico, there a Non obstante is not good, and so is this Statute.

He cannot dispense with the Statute of 31 Eliz. against Symony; for the Party being disabled by an * Act of Parliament, cannot be enabled by a Non obstante; he cannot dispence with the Statute of Leases of †Ecclesiastical Persons, nor with the Jurisdiction of the *Admiralty encroaching upon the Common Law; for the Foundation of a Non obstante is in the King's Prerogative, and is current in his Grants; but in those Statutes the Subject hath an Interest.

*Hob. 57. 1 Inst. 120.

† 5 Co. 15.

*13 R. 2. c. 3. 15 R. 2. c. 5. 2 H. 4. 11. 4 Inst. 153.

The Laws concerning Non obstantes are none of the *ancient Laws of this Land, but brought in by the Pope. The Book of 2 H. 7. F. 6. b. and 7. did first give Rise to this exorbitant Power; yet it is not the Opinion of all, or indeed of any of the Judges then, as 'tis affirmed to be, for Broke Pat. 45, 109. who abridged that Case, took no Notice of any Opinion of the Judges; yet some grounding themselves on that Book, affirm that the King may dispence with the Statute of the 23 H. 6. cap. 8. which Enacts, That no Man shall be Sheriff for above one Year; and that therefore a Patent granted by Ed. 4. to the Earl of Northumberland, to be Sheriff of the same County for Life, was held good; which is a plain Mistake, for there never was any such Resolution, neither did the Judges make any Determination upon that Statute, it was only a Discourse Obiter by Radcliff (who was then one of the Barons of the Exchequer) concerning the Statutes of the 14 E. 3. cap. 7. and of the 42 E. 3. cap. 9. which are only Prohibitory, That no Sheriff shall continue in his Office above one Year; but have not any such Clause in them as the Statute of 23 H. 6. hath, which saith, That all Patents made to any to be Sheriff for above a Year shall be void, any Clause or Word of *Non obstante* in any wise put in such Patent notwithstanding: This was the Mistake of Baron Radcliff, who upon a sudden Discourse thought there might be such Clauses in those former Statutes of Ed. 3. and that notwithstanding which, there being a Non obstante in that Patent to those Statutes, he held that to be a good Dispensation of them; but 'tis plain there are no such Clauses in those Statutes, and therefore a Non obstante to them is good, and which was the true Reason why that Patent in Henry the 7th's Time was held good.

*Davis Rep. 69, 70, 71. Vaugh. 332. Thomas *versus* Sorrel. Hob. 146. Colt *and* Glover. Long 5 E. 4. 33, 34.

Postea.

2. Another Reason might be, because the Office of Sheriff was grantable for Life, and so not within the Reach of the Prohibition by those Statutes.

3. But if it was, yet the Proviso in the Act of Resumption of 1 H. 7. protected that Patent, by which the King resumed all Grants made by E. 4. but provides for the Earl's Grant.

Dyer. 352. a. 2 Roll. Abr. 193. Cro. Eliz. 513 T. Jones, 117, 128.

But admitting the Statute of R. 2. and of H. 6. may be dispensed withal in this Case, yet it should be more particular than in this Patent to the Plaintiff; for Non obstante aliquo Statuto generally will not serve.

*2 H. 4. 12. Bro. Accompt 24, 65, 89. 1 Inst. 212.

2. Point. A general Indebitatus assumpsit will not lie here for Want of *Privity, and because there is no Contract, 'tis only a Tort, a Disseisin, and the Plaintiff might have brought an Assise for this Office, which lies at the Common Law; and so it hath been adjudged in Jehu Webb's Case, 8 Co. 4. Which is also given by the Statute of Westm. 2. cap. 25. for a Profit apprender in alieno solo.

The Plaintiff might have brought an Action on the Case against the Defendant, for disturbing of him in his Office, and that had been good, because it had been grounded on the Wrong.

6 H. 6. 9. 1 Roll. Abr. 597. pl. 5.

In this Case the Defendant takes the Profits against the Will of the Plaintiff, and so there is no Contract; but if he had received them by the Consent of the Plaintiff, yet this Action would not lie for Want of Privity. 'Tis true, in the Case of the King, where his Rents are wrongfully received, the Party may be charged to give an Accompt as Bailiff; so also may the Executors of his Accomptant, because the Law createth a Privity; but 'tis otherwise in the Case of a Common Person, 10 Co. 114. b. 11 Co. 90. b. Because in all Actions of Debt, there must be a Contract, or quasi ex Contractu; and therefore where Judgment was had, and thereupon an Elegit, and the Sheriff returned that he had appraised the Goods, and extended such Lands, which he delivered to the Plaintiff, ubi revera he did not, per quod Actio accrevit, which was an Action of Debt; but it was adjudged that it would not lie, because the Sheriff had not returned that he meddled with the Goods or with the Value of them, and therefore for Want of Certainty how much to charge him with, this Action would not lie, but an Action on the Case for a false Return; but if he had returned the Goods sold for so much Money certain, which he had delivered, then an Action of Debt would lie; for though 'tis not a Contract, 'tis quasi ex Contractu, Hob. 206.

Godb. 276. 2 Sand. 344. 2 Cro. 566.

3. Point. The Jury find that the Defendant received the Profits for seven Years, and that the Plaintiff had his Patent but two Years,

Years, and do not ſhew what was received by the Defendant within thoſe two Years, and then the Court cannot apply it.

But on the other Side it was ſaid by Sawyer, That this Non obſtante was good; for where an Act of Parliament comes to reſtrain the King's Power and Prerogative, it was always held ſo to be, and he relied upon the Judgment of 2 H. 7. f. 6. that the King might diſpenſe with the Statute of 23 H. 6. which he affirmed to be the conſtant Uſage ever ſince, and that therefore the Law is ſo taken to be at this Day. Ex parte Quer. Pl. Com. 502. b. Dyer 303.

As to the Second Point, both he and the Solicitor General Winnington ſaid, That an Indebitatus aſſumpſit would lie here, for where one receives my Rent, I may charge him as Bayliff or Receiver; or if any one receive my Money without my Order, though 'tis a Tort, yet an Indebitatus will lie, becauſe by the Receipt of the Money the Law creates a Promiſe, and the Action is not grounded on the Tort, but on the Receipt of the Profits in this Caſe.

As to the Objection about the Finding, they held that to be nugatory and idle; for it cannot be intended that the Damages given were for the Time the Defendant received the Profits, before the Plaintiff had his Patent, neither is there any Thing found in the Verdict to that Purpoſe.

In Michaelmas Term following, the Court gave Judgment for the Plaintiffs. Judgment.

1. They held, that the King might diſpence with this Statute, for the Subject had no Intereſt, nor was in any wiſe concerned in the Prohibition, it was made only for the Eaſe of the King; and by the like Reaſon he might diſpenſe with the Statute of 4 H. 4. 24. That a Man ſhall hold the Office of *Aulnager, without a Bill from the Treaſurer; and with the Statute of 31 H. 6. 5. That no Cuſtomer or Comptroller ſhall have any Eſtate certain in his Office, becauſe theſe and ſuch like Statutes were made for the Eaſe of the Sovereign, and not to abridge his Prerogative, and that the general Clauſe of Non obſtante aliquo alio Statuto was ſufficient. Hob. 146. *Dyer 203.

2. An Indebitatus aſſumpſit will lie for Rent received by one who pretends a Title; for in ſuch Caſe an Accompt will lie: Wherever the Plaintiff may have an Accompt, an Indebitatus will lie. 4 H. 7. 6. b. Moor 458. T. Jones 127, 128.

As to the Finding 'tis well enough, for the Jury aſſeſs Damages Occaſione præmiſſorum in narratione mentionat', which muſt be for the Time the Plaintiff had the Office, and that a Patent would make a Man an Officer before Admittance.

Steward

Steward *Executor of* Steward, *versus* Allen.

Demand must be made where an Interest is to be determined.

DEBT for a Rent reserved upon a Lease for Years, in which there was a Proviso, That if the Rent be behind and unpaid by the Space of a Month next after any or either of the Days of Payment, then the Lease to be void.

The Plea was, That the Rent was behind a Month after a Day on which it was reserved to be paid, and so the Lease is void; to which Plea the Plaintiff demurred, because the Defendant did not say that the Plaintiff demanded the Rent; for though the Rent be due without Demand, yet the Interest shall not be determined without it, which must be expressly laid in the Pleading; and of that Opinion was the Court, except Justice Atkins, who doubted.

Searl *versus* Long.

Quare impedit, real Mainpernors must be returned upon the Summons, Pone *and* Grand Cape. 2 Inst. 124. Mod. Rep. 248.

JUdgment final was given in a Quare Impedit, according to the Statute of Marlebridge, cap. 12. Which Serjeant Pemberton moved to set aside.

He said, That at the Common Law the Process in a Quare Impedit was Summons, Pone, and Distress infinite, which being found mischievous in Respect of a Lapse, it was therefore provided by this Statute, that if the Disturbers do not appear upon the Summons, then they shall be attached to appear at another Day, &c. Now here upon the Attachment the Sheriff hath returned, Attachiatus fuit by John Doe and Richard Roe, who are feigned Persons, and not Mainpernors; for the Defendant hath made Oath, That he did not know any such Persons, neither was he ever attached; so that 'tis not only a Matter of Form, for he ought to have that Notice which the Law requires, it being so penal upon him.

'Tis probable this Mistake might arise from Mr. Dalton, who in his Book of the Office of Sheriffs, in the Returns of Writs there, hath put down these feigned Attachers for Examples Sake, from whence the Sheriff in this Case might infer that they need not be real Persons, as in Truth they ought, both upon the Summons, Pone, and Distress; and he cited a Case lately adjudged, where the like Return was made upon the Grand Cape, and the Judgment set aside; and of this Opinion was the whole Court, and said, Where the Process is so fatal, the Party ought to be

be duly ſerved, and that the Sheriff ought to have gone to the Church and to have ſeiſed the Profits; and if there be nothing, to return a Nihil; and though the Judgment was given before the Term, or long ſince, yet when 'tis Irregular, 'tis to be ſet aſide, and ſo it was now; and being moved again, the Court continued of their former Opinion.

The like Caſe was moved in Michaelmas Term following, between Fleming *and* Lee, where the Patron Defendant was thus ſummoned and never appeared, and the Incumbent did caſt an Eſſoign; and a Caſe was cited between Vivian and the Biſhop of London, Mich. 23 Car. 2. in C. B. where the like Judgment was ſet aſide.

But on the other Side it was objected, That leaving due Notice upon the Summons, was as much as was require, for the other Writs are only to give the Defendant Time to plead, and therefore 'tis not neceſſary that Notice ſhould be given upon every one of the Writs; for if once ſerved, 'tis enough, 11 H. 6. 3, 4. 36 H. 6. 23. 8 H. 6. 8. Long 5 to E. 4. 26. 29 E. 3. 42, 43. Doctor and Stud. 125, 126. 21 H. 6. 56.

But the Court were of Opinion, That the Defendant having not appeared, nor caſt an Eſſoign; and Judgment final being given, it was Reaſon that all the Proceſs ſhould be ſerved really, of which there had been no Occaſion, if he had either appeared or eſſoined, and therefore the Proceſs not being duly ſerved, Judgment was ſet aſide, Raſt. En. 217. And they held, that the Eſſoign of the other Defendant was no wiſe binding to the Patron Defendant, becauſe they may ſever in Pleading, and ſo that Judgment was likewiſe ſet aſide. Curia.

DE
Term. Sancti Mich.
Anno 29 Caroli II. in Communi Banco.

Sir John Otway *verſus* Holdips *Executor*, &c.

Bond to pay 40 *l.* when an Accompt ſhall be ſtated, 'tis a Covenant, and not a *Solvendum.*

DEBT upon Bond brought by the Plaintiff againſt the Defendant as Executor, wherein the Teſtator did acknowledge himſelf to be indebted to the Plaintiff in 40 l. which he thereby did covenant to pay when ſuch a Bill of Coſts ſhould be ſtated by two Attornies indifferently to be choſen between them; and ſets forth in his Declaration, that he named one Attorney, and deſired the now Defendant to name another, which he refuſed, and ſo intitles himſelf to this Action.

The Defendant pleads Non detinet, to which the Plaintiff demurred.

But the Plea was not offered to be maintained, becauſe the Executor cannot plead Non detinet but where the Teſtator himſelf might plead Nil debet, which in this Caſe he could not do. But it was inſiſted, That the Declaration is not good, becauſe the Money was to be paid upon an Accompt ſtated, which not being done, by the Plaintiff's own ſhewing 'tis not yet due; and this ought to be taken as penned, viz. Solvendum, and not an expreſs Covenant.

But on the contrary, it was held not to be a Solvendum, but a Covenant to pay the Money, the Debt and the Duty being in the firſt Place aſcertained; but if it be a Solvendum, and repugnant to the Obligatory Clauſe, 'tis void, 21 Ed. 4. 36.

As the Defendant would have it expounded, it would be in his Power totally to defeat the Bond either way; for if he would never chuſe an Attorney, there could be never any Thing due.

The

The whole Court were of Opinion, that it was not a Solvendum, but a Covenant, which did not take away the Duty ascertained by the Obligation; and if it should not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor whether ever it shall be payable; but be it either the one or the other, the Plaintiff having named an Attorney, ought to recover; and Judgment was accordingly given for him.

Dunning *versus* Lascomb.

DEBT on a Bond, the Condition was to pay Money when a Ship should go from A. to C. and from thence to Bristol, and should arrive there or at any other Port of Discharge in England; the Ship going from A. to C. took in Provisions at Bristol, but not to be discharged there, but proceeded in her Voyage to Cales, and was cast away: And by the Opinion of the Court, the Money was not payable; but if he had never intended to perform the Voyage, it might have been otherwise, 1. Roll. Abr. 142. 39 H. 6. 10. Judgment for the Defendant nisi.

Atkins *versus* Bayles.

AN Information was exhibited against the Defendant, being a Justice of the Peace, for refusing to grant his Warrant to suppress a Conventicle.

Outlawry pleaded to an Information, good.

The Defendant pleads an Outlawry in Disability; and the Plaintiff demurred.

1. This Plea is not good, because the King is interested qui tam, &c. and therefore where the Informer dies, the Attorney-General may proceed. 3 Inst. 194.

2. The Statute gives Power to any Person to inform, &c. by which general Words the Disability of this Person is removed.

But the Court held, that there was no Colour in either of these Objections.

3. 'Tis not pleaded sub pede sigilli, sed non allocatur, for it need not be so pleaded being in the same Court.

4. 'Tis not averred that the Plaintiff was the same Person, who was outlawed; but it was answered that the prædictus makes that certain, and that though the King be interested, yet the Informer

Moor 541. Dyer 227. b. Cro. Eliz. 583.

former only is Plaintiff and entituled to the Benefit, and that though he was disabled, yet he might sue for the King, but not for himself; and therefore Judgment was given that the Plea was good.

Harwood & Bincks *versus* Hilliard, &c.

Notice, where 'tis agreed to be in Writing, must be so pleaded.

By an Agreement between the Plaintiffs and the Testator of the Defendant, a Parcel of Lands was to be sold for 400 l. but if it did not arise to so much, then they covenanted with each other to repay proportionable to the Abatement; and the Defendant's Testator covenanted for himself and his Executors to pay his Proportion to the Plaintiffs, so as the Plaintiffs gave him Notice in Writing of the said Sale by the Space of ten Days, but doth not say, that such Notice was to be given to his Executors or Administrators.

And now the Plaintiffs averred, That they gave Notice accordingly to the Defendant who was Executor, and the Breach assigned was, That he hath not paid, &c.

The Defendant demands Oyer of the Indenture, wherein was a Variance between the Covenant (which was for Notice to be given to the Testator) and this Declaration (by which Notice is averred to be given to the Executor); and for this Reason he demurred.

And Serjeant Dolben, Recorder of London, argued for him, That this was in the Nature of a Condition Precedent, and therefore they ought to have given the Testator Notice, which according to the Agreement ought also to have been personal; which not being done, but only Notice given to his Executor, did make a material and fatal Difference between the Covenant and this Declaration, 14 H. 6. 1. 1 H. 6. 9.

And that in this Case there was no Covenant by the Testator at all, for all agree to pay their Proportions, and the Testator should pay his Part, which is not a Covenant.

Barrel, Serjeant on the other Side, said, That the Executor doth represent the Person of the Testator; and that though this Covenant was to give Notice to the Testator, yet if the Declaration had been of a Covenant to give Notice to him, his Executors and Administrators, &c. it had been no material Variance so as to prejudice the Action of the Plaintiff, because 'tis no more than what the Law implies, Pl. Com. 192.

And

And upon the First Opening this Matter this Term, the Chief Justice and Justice Atkins enclined, That the Notice ought to be Personal, and that the Variance was material: But afterwards in Hillary Term following mutata opinione, the whole Court agreed it to be otherwise, because the Covenant runs in Interest and Charge, and so the Executor is bound to pay; and therefore 'tis necessary that he should have Notice, and that there was no material Difference between the Declaration and the Covenant. And Lastly, That the Testator being a Party to the Deed, his Agreement to pay amounts to a Covenant, though the formal Words of Covenant, Grant, &c. were wanting. Antea.

But then Serjeant Dolben perceiving the Opinion of the Court, insisted, that the Declaration was naught, for another Reason, viz. They had not declared, that this Notice was given in Writing, which is expressly agreed in the Covenant; to which it was answered, that the Defendant having pleaded that he gave Notice secundum formam & effectum Conditionis, it was well enough.

But he said, that would not help the Want of Substance, and cited a Case where an Action of Debt was brought for the Performance of an Award, so as the same was delivered in Writing, &c. The Defendant pleaded Non deliberavit in scriptis, &c. The Plaintiff replied and set forth the Award in Writing, but did not directly answer the Plea of delivering it in Writing, only by way of Argument; and upon Demurrer, there omnes Justiciarii contra Querentem; and so they were in this Case, that the Notice must be pleaded in Writing, and that secundum formam Conditionis was not good; And so Judgment was given for the Defendant. Dyer 243. b.

Frosdick *versus* Sterling.

THE Plaintiff alone brought an Action on the Case against the Defendant, and sets forth, That he and his Wife in her Right were seised of a Messuage, Bake-House and Cole-Yard, &c. and that the Defendant had erected two Houses of Office so near the said Bake-House, that the Walls thereof became foundrous, and the Air so unwholesome, that he lost his Custom; and that the Defendant had digged a Pit so near the said Cole-Yard that the Walls thereof were in Danger of falling; and that he had built another Wall so near the said Messuage, that he had stopped an old Light therein: Upon Not-guilty pleaded, there was a Verdict for the Plaintiff. Baron and Feme where the Action, if it's not discharged, shall survive to her, they must both join.

And

And now Serjeant George Strode moved in Arrest of Judgment; for that the Wife should have been joined in this Action, for where she may maintain an Action for a Tort done in the Life-time of her Husband, if she survive, and where she may also recover Damages, in such Cases she must join; and it hath been adjudged, that she ought to join with her Husband for stopping a Way upon her Land. Cro. Car. 418.

1 Roll. Abr. 348. pl. 1. 20 H. 6. 1. 7 Ed. 4. 15. Cro. El. 461.

So also for cutting down Trees on the Jointure of the Wife, made to her by a former Husband, by Reason whereof the present Husband lost the Loppings, they both joined; for though the Wrong was done to his Possession, and he might have released, yet because there was also a Wrong done to the Inheritance, they ought both to join, Cro. Car. 438.

2 Inst. 650.

So it hath been adjudged, That the Husband and Wife in Right of the Wife joined in an Action of Debt upon the Statute of 2 E. 6. cap. 13. for not setting out of Tythes, and held good, and where the Wife cured a Wound, both joined in the Action, 11 H. 4. 16. 46 E. 3. 3.

2 Cro. 205, 399. 9 E. 4. 55.

The Court held, That where the Action (if not discharged) shall survive to the Wife, they ought both to join, which if they had done here, it would have been hard to have maintained this Action, because entire Damages are given; and for losing the Custom to his Bake-house, the Husband alone ought to have brought the Action. He may bring an Ejectment of the Lands of his Wife; but Judgment was stayed, till moved on the other Side.

Barker *versus* Warren.

Justification where 'tis not local, a Traverse of the Place makes the Plea naught.

AN Action was brought against a Carrier, and laid in London, for losing of Goods there, which were delivered to him at Beverly in Yorkshire to re-deliver at London.

The Defendant pleads, That he was robbed of the said Goods at Lincoln, absque hoc that he lost them in London. And the Plaintiff demurred.

1. For that Robbery is no Excuse for a Common Carrier, so that the Plea is not good in Substance.

2. This was no local Justification, so that the Traverse was ill.

But

But on the other Side it was said by Serjeant Hopkins, that the Plea was good, and that the Defendant might Traverse the Place: For in Trespass for the taking of Goods in Coventry, the Defendant pleaded, that the Plaintiff did deliver the Goods to him at London to deliver at Dale, by Force whereof he took them at London, and delivered them at Dale accordingly, absque hoc that he took them at Coventry, and held good, for by his Plea he hath confessed the Delivery and the Taking both at one Time and Place; and he could not have pleaded the Delivery at London, and justifie the Taking at Coventry, because the Possession is confessed by the first Delivery at London, and therefore the Justification of the Taking at Coventry had been inconsistent, 24 H. 6. 5. But it had been otherwise, if the Defendant had justified, because the Plaintiff gave him the Goods at London, by Force whereof he took them at London, absque hoc that he took them at Coventry, because by such Gift or Delivery he might justifie the Taking any where, as well as where the Delivery was made.

2. That the Declaration was ill, for the Agreement was to deliver the Goods at London, and the Breach was, that he left them at London, and so but Argumentative, Aston pl. Red. 62. Hern's Pleader 76. Brownl. Pleadings 139.

But the Court were of Opinion, that the Declaration was good, and the Plea was naught in Substance; but if it had been good, the Traverse notwithstanding had been ill, because the Justification was not local, though Justice Scroggs was of a contrary Opinion: And Judgment was given for the Plaintiff. 2 Cro. 45, 372.

Nota, The Plaintiff had Leave given by the Court to alter the Visne from London to Middlesex, because all the Sittings in London were on a Saturday, and his Witness was a Jew, and would not appear that Day. Visne altered, *Propter necessitatem.*

Mendyke *versus* Stint.

Prohibition to the Sheriff's Court after Verdict and Judgment, comes too late.

PRohibition was prayed to the Sheriff's Court of London: The Suggestion was, That the Plaintiff was sued in that Court in an Action on the Case, and sets forth the Proceedings at large, that there was a Verdict against him there, and averred that the Contract upon which he was sued there revera was made in Middlesex, and so the Cause of Action did not arise within their Jurisdiction;

Jurisdiction; and upon Demurrer to the Prohibition, Serjeant Pemberton argued,

2 Inst. 229, 243, 601. West. 1. c. 35. F.N.B. 45. b. Hob. 106.

1. That a Prohibition doth lie to any Court, as well Temporal as Spiritual, (where such Courts exceed their Bounds) for both those Jurisdictions are united to the Imperial Crown; it may be granted to the Dutchy Court, if they hold Plea of Lands not Parcel of the Dutchy.

2. Though the Jury have here found that the Defendant assumpsit modo & forma, yet such finding as to Time and Place is not material; nor is it any Estoppel in a new Action laid in another County, to aver that it was for the same Thing: 'Tis true, both Time and Place may be made material by Pleading, and so it had been in this Case, if the Jury had found the Place precisely, for it would have been an Estoppel.

* Antea, Squibb *and* Hole.

The Verdict therefore is nothing, and all they have done is coram non Judice. The Case of *Squibb and Hole he cited as an Authority in Point, where it was adjudged no Escape in the Officer, to let a Man at Liberty, who was in Execution upon a Bond sued in an Inferior Court, the Bond not being made within the Jurisdiction thereof.

Ex parte Def.

But Maynard, Dolben, Goodfellow and Sympson, Serjeants, contra. They agreed, that where it appears by the Plaintiff's Libel that the Court had no Jurisdiction, there a Prohibition lies at any Time; but if what is in the Declaration is laid infra Jurisdictionem, there the Party must plead extra Jurisdictionem; and if they refuse to plead to the Plea, a Prohibition will lie after Sentence.

But here is an Action on the Case brought, of which the Sheriff's Court can hold Plea, and which is laid to be infra Jurisdictionem, and not denied by the Plaintiff in his Plea, and therefore now, after Verdict and Judgment, he comes too late for a Prohibition; and upon this Difference, Prohibitions have been usually either granted or denied to the Spiritual Courts.

Though the Court hath not Cognisance of the Cause, yet the Proceedings are not coram non Judice; for if it be alledged to be within the Jurisdiction, and the Defendant takes no Exception to it, and then Sentence is given against him, he hath thereby admitted the Jurisdiction.

Stiles 45. by the Opinion of Rolls C. J. 2 Roll. Abr. 318.

So where a Man sued for a Legacy in the Prerogative Court, where the Will was proved, and Sentence given, and an Appeal to the Delegates, and Sentence affirmed, and then a Prohibition granted (but without Notice) upon the Statute of 23 H. 8. cap. 9. for that the Parties lived in another Diocels; but the Plaintiff having allowed the Jurisdiction in all the former Proceedings

ceedings, though the Prohibition was granted, the Court would not compel the Party to appear and plead, but granted a Consultation, Cro. Car. 97. Smith *versus* the Executors of Pondrel.

In Hillary-Term 1675. in B. R. between Spring *and* Vernon, and in Michaelmas-Term in 22 Car. 2. B. R. Buxton's Case, and in Hillary-Term the 22 & 23 Car. 2. in the same Court, between Cox *and* St. Albon Prohibitions were denied after the Jurisdiction admitted by Pleading. Mod. Rep. 81.

The Chief Justice, Wyndham and Atkyns, upon the first Argument enclined that a Prohibition ought to be granted, because the Admittance of the Party cannot give a Jurisdiction where originally there was none; but afterwards they were all of Opinion, that the Prohibition should not go, but said, That the Plaintiff in the Inferiour Court ought to have been nonsuited, if it appeared upon the Evidence, that the Cause of Action did arise extra Jurisdictionem.

In this Case, these Things were agreed by the Court:

1. That if any Matter appears in the Declaration, which sheweth that the Cause of Action did not arise infra Jurisdictionem, there a Prohibition may be granted at any Time. Sid. 151. Vaughan 405.

2. If the subject Matter in the Declaration be not proper for the Judgment and Determination of such Court, there also a Prohibition may be granted at any Time.

3. If the Defendant, who intended to plead to the Jurisdiction, is prevented by any Artifice, as by giving a short Day, or by the Attornies refusing to plead it, &c. or if his Plea be not accepted or is over-ruled; in all these Cases, a Prohibition likewise will lie at any Time. 1 Ven. 333.

And the Chief Justice, and Wyndham Justice, were of Opinion, that after the Defendant had admitted the Jurisdiction by pleading to the Action, especially if Verdict and Judgment pass, the Court will not examine whether the Cause of Action did arise out of the Jurisdiction or not. But Atkyns and Scroggs, Justices, said nothing to this last Point, but that many Times an Advantage given by the Law was lost by coming too late, and instanced that a Visne may be changed in Time, but not if the Party come too late; so if the Time of the Promise be laid above six Years from the Time of the Action brought, if the Statute of Limitations be not pleaded, the Defendant cannot take afterwards Advantage of it.

Whereupon a Prohibition was denied, and Judgment was given for the Defendant.

Birch *verſus* Wilſon.

Plea, tho' it amount to a general Iſſue, if it doth diſcloſe Matter of Law beſides, it ſhall not be demurred unto.

IN an Action on the Caſe, the Plaintiff declared that he was ſeiſed of a Meſſuage and ſeveral Lands in the Pariſh of Dale, and that he and all thoſe whoſe Eſtate he hath, have uſed to have Right of Common, for all Commonable Cattle Levant and Couchant upon the Premiſſes, in a certain Meadow there, called Darpmore Meadow, and in a certain Place called Cannock Wood. That the Defendant Præmiſſorum non ignarus, had encloſed the ſaid Places in which the Plaintiff had Right of Common, and likewiſe put in his Cattle, as Horſes, Cows, Hogs, Geeſe, &c. ſo that he could not in tam amplo & beneficiali modo enjoy the ſame.

The Defendant as to the Incloſure, and putting in of his Hogs and Geeſe, pleaded Not Guilty: And as to the Reſidue, That the Lord Paget was ſeiſed of a Meſſuage, 300 Acres of Land, 40 Acres of Meadow, and 100 Acres of Paſture, and likewiſe of Darpmore Meadow and Cannock Wood, and being ſo ſeiſed, did by Deed of Bargain and Sale enrolled, in Conſideration of 2000 l. convey the ſaid Meſſuage, 300 Acres of Land, 40 Acres of Meadow, and 100 Acres of Paſture, to the Defendant and his Heirs, and by the ſame Deed did grant unto him all Ways, Commons, and Emoluments whatſoever to the ſaid Meſſuage and Premiſſes belonging, or therewithal uſed, occupied or enjoyed, or taken as Part, Parcel or Member thereof, virtute cujus the Defendant became ſeiſed of the Premiſſes; and that the ſame were leaſed and demiſed for Years by the ſaid Lord Paget, and all thoſe whoſe Eſtate he had a tempore cujus contrarii memoria hominum non exiſtit; and that the Tenants or Occupiers thereof a tempore cujus, &c. uſed to have Common in Darpmore Meadow and Cannock Wood, for all commonable Cattle Levant and Couchant upon the Premiſſes, and uſed to put in their Cattle into the ſaid Places, in which, &c. virtute cujus the Defendant having Right, did put in his ſaid Cattle into the ſaid Places to take Common there, and averred, That there was Common ſufficient both for the Plaintiff and himſelf.

To this Plea the Plaintiff demurred.

This

This Case was argued by Serjeant Pemberton for the Plaintiff, and by Serjeant Weston for the Defendant; and for the Plaintiff it was said, That it was no good Plea, but rather a Design to introduce a new Way of Common. Ex parte Quer.

The Reasons offered why the Plea was not good, were,

1. That the Defendant could not prescribe, because of the Unity of Possession; for the Lord Paget had the Premisses in and to which, &c. and therefore he hath prescribed by a collateral Matter, Viz. by alledging that the Land was usually let to Tenants for Years, but doth not say whether they were Tenants by Copy of Court-Roll or not, neither doth he make out any Title in them. Cro. Car. 419.

In some Cases where a Man is not privy to the Title, he may say generally, that the Owners and Occupiers used to do such a Thing, &c. and this Way of Pleading may be good; but here the Defendant claiming under them, ought to set forth their Title, or else he can have no Right to the Common.

2. By this Plea he intended that the Lord Paget had made a New Grant of this Common; for he sets forth, That he granted the Premisses, and all Commons used with the same, and so would intitle himself to a Right of Common in those two Places, as if Common had been expressly granted to him there, which if it should, 'tis but Argumentative, and no direct Affirmance of a Grant, upon which the Plaintiff might have replied non concessit, for no Issue can be joined upon it.

3. He ought to have set forth, That the Tenants lawfully enjoyed the Common there; but he lays only an Usage to have Common, which may be tortious.

4. He doth not say, That there is sufficient Common for all the Commoners, but only for the Plaintiff and himself: 'Tis true, the Owner of the Soil may feed with his Tenant, who hath a Right of Common, but he cannot derogate from the first, by streightning the Common by a second Grant, and so leave not Sufficient for the Tenant.

5. This Plea amounts to the General Issue, and the Plaintiff hath specially assigned that for a Cause of Demurrer; for he saith, That the Defendant, without any Title, put in his Cattle, by which the Plaintiff had not sufficient Common; and the Defendant pleads he put in his Cattle rightfully, and the Plaintiff had Common enough, which if it signifie any Thing, must amount to Not Guilty. Cro. Car. 157.

Ex parte Def.

But on the other Side, the laſt Objection was endeavoured to be anſwered firſt, becauſe if that hold, yet if the Plea be never ſo good in Subſtance, the Plaintiff would have Judgment.

It was agreed that this Plea doth amount to a General Iſſue, and no more, but that every Plea that doth ſo, is not therefore bad; for if it otherwiſe contain reaſonable Matter of Law, which is put upon the Court for their Judgment, rather than referred to the Jury, there is no Cauſe of Demurrer; for it is the ſame Thing to have the Doubt or Queſtion in Law before the Judges in Pleading, as to have it before them upon a Special Verdict.

In 2 R. 2. 18. A Retainer was pleaded ſpecially by an Adminiſtrator, which is no more than Plene Adminiſtravit, yet no Demurrer; but the Book ſaith, that the Court ought to be moved.

2. The Plea is good as to the Matter of it; for the Defendant claims the ſame Common by his Grant, which had been uſed Time immemorial, and alledges it to be of all Common uſed with the Premiſſes, and this was a Common ſo uſed.

In Treſpaſs, The Defendant juſtified that Godfrey was ſeiſed in Fee of a Houſe, and of 20 Acres of Land, and that he and all thoſe, &c. had Common in the Place where, &c. to the ſaid Meſſuage belonging; and that he made a Feoffment to Bradſhaw of the ſame, who made a Leaſe thereof to the Defendant, with all Profits and Commodities thereunto belonging, vel occupat' vel uſitat' cum prædicto Meſuagio: It was adjudged, that though the Common was gone and extinct in the Hands of the Feoffor, by the Unity of the Poſſeſſion, yet thoſe Words were a good Grant of a New Common for the Time granted in the Leaſe, and that it was quaſi, a Common in the Hands of Godfrey the Feoffor, Cro. Eliz. 570. Godfrey *verſus* Eyre.

And though it hath been objected, That this Plea is not formally pleaded, becauſe it ought to have been direct in alledging a Grant; whereas it was only Argumentative, and brought in by a Side-Wind: He ſaid, That as bad as it was, 'twas drawn by that Serjeant who argued againſt him, and who did very well know, that the Averment of Sufficiency of Common was needleſs.

Curia.

The Court were all of Opinion, That though the Plea did amount to the general Iſſue, yet for that Reaſon alone the Plaintiff had no Cauſe of Demurrer; for the Defendant may well

well diſcloſe the Matter of Law in Pleading, which is a much cheaper Way than to have a Special Verdict, and that this is on the ſame Reaſon of giving of Colour; but if the Matter by which the Defendant juſtifies be all Matter of Fact, and proper for the Tryal of a Jury, then the Defendant ought to plead the General Iſſue. 2 Ven. 295.

And as to the Matter of the Plea, the Chief Juſtice and Windham Juſtice held it to be good; for the Common which was pleaded was a Common by Grant, and not argumentatively pleaded; for if the Defendant had pleaded an expreſs Grant of Common in thoſe two Places, and the Plaintiff had demanded Oyer of the Deed, it would have appeared that there was no ſuch Deed, and this had been a good Cauſe of Demurrer.

If this Plea ſhould not be good, it would be very Miſchievous to the Defendant; for there being a perpetual Unity, as to the Freehold there can be no Preſcription to the Common; but there being a conſtant Enjoyment thereof by the Tenants, and ſo a perpetual Uſage and a Grant made referring to that Uſage, 'tis well enough: And ſince, whilſt the Lands were in Poſſeſſion of the Lord, the Commoners could not complain of a Surcharge; why ſhould they, if he grant the Premiſſes, the Grantee being in Loco, &c.

In the Caſe of the King, a Grant of tot & talia Libertates & Privilegia quot & qualia the Abbot lately had, was held good by ſuch general Words: Here the Lord Paget granted to the Defendant that which the Leſſees had before, viz. That Common which the Tenants had Time out of Mind; and it cannot be conceived, but that the Tenants had a Right; for as a Tort cannot be preſumed to be from Time immemorial, ſo neither ſhall it be intended that the Lord gave only a Licence, and permitted his Tenants to enjoy this Common. 9 Co. 23. Abbot *de Strata Marcella.*

But Juſtice Atkins was of Opinion, that the Plea was not good; he ſaid, he knew not by what Name to call this Common; for it was no more than a Permiſſion from the Lord, that the Tenants might put their Cattle into his Freehold, or a Connivance at them for ſo doing; and if it be taken as a new Grant, then nothing can paſs but the Surplus; for the Lord cannot derogate from his former Grant, and the new Grantee ſhall not put in an equal Proportion with him who hath the Preſcription; for if he may, then ſuch Preſcription would be quite deſtroyed by ſuch puiſne Grant; for as the Lord might grant to one

one, so he might to Twenty, and then there would not be sufficient Common left for him, who prescribes to the Right: So that he conceived that the Defendant had no Right of Common, or if he had any, it would not be till after the Right of the Plaintiff was served; and he said, that Usage shall not intend a Right, but it may be an Evidence of it upon a Trial.

But if there had been an Usage, 'tis now lost by the Unity of the Possession, and shall not be revived by the new Grant, like the Case of Massam *and* Hunter; there was a Copyholder of a Messuage and two Acres in Fee, which the Lord afterwards granted and confirmed to him in Fee cum Pertinentiis, it was adjudged that though the Tenant by Usage had a Right to have Common in the Lord's Waste, yet by this new Grant and Confirmation that Right was gone (the Copyhold being thereby extinguished); for the Common being by Usage and now lost, these Words cum Pertinentiis in the new Grant will not revive it.

Yelv. 189.

But notwithstanding, Judgment by the Opinion of the other three Justices, was given for the Defendant.

Week's *Case*.

A Prohibition was prayed to the Ecclesiastical Court at Bristol; the Suggestion was, That he was excommunicated for refusing to answer upon Oath to a Matter by which he might accuse himself, viz. to be a Witness against another; that he himself was present such a Day, and saw the other at a Conventicle, which if he confessed, they would have recorded his Confession of being present at a Meeting, and so have proceeded against him.

The Court granted a Prohibition, but ordered him to appear in the Ecclesiastical Court, to be examined as to the other Persons being there.

Anonymus.

Anonymus.

A Man wins 100 l. of another at Play; the Winner owed Sharp 100 l. who demanded his Debt; the Winner brought him to the other, of whom he won the Money at Play, who acknowledged the Debt, and gave Sharp a Bond for the Payment of the 100 l. who not being privy to the Matter, or knowing that it was won at Play, accepted the said Bond, and for Default of Payment puts it in Suit; the Obligor pleads the Statute of Gaming.

Gaming not within the Statute where the Security is given to a Third Person.

The Plaintiff in his Replication discloseth the Matter aforesaid and saith, That he had a just Debt due and owing to him from the Winner, and that he was not privy to the Monies being won at Play, &c. and that he accepted of the said Bond as a Security for his Debt; and the Defendant demurred.

And the Court were all of Opinion, that this Case was not within the Statute, the Plaintiff not knowing of the Play; and though it be pleaded that the Bond was taken pro Securitate, and not for Satisfaction of a just Debt, it was held well enough, like the Case of Warns and Ellis, Yelv. 47. Warns owed Alder 100 l. upon an usurious Contract, and Alder owed the Plaintiff Ellis 100 l. for which they were both bound; and in an Action of Debt brought upon this Bond, Warns pleads the Statute of Usury between him and Alder; and Ellis replied as the Plaintiff here; and upon a Demurrer it was adjudged for the Plaintiff by three Judges, because the Plaintiff had a real Debt owing him, and was not privy to the Usury: And upon this Case the Court relied, and said, the Reason of it governed this Case at the Bar; whereupon Judgment was given for the Plaintiff.

Hill *and* Pheſant, Antea.

Tiſſard *verſus* Warcup.

INdebitatus Aſſumpſit for 750 l. laid out by the Plaintiff for the Use of the Defendant: Upon Non aſſumpſit pleaded, there was a Tryal at the Bar; and the Evidence was, That the Defendant and another, now deceaſed, farmed the Exciſe; that the Money was laid out by the Plaintiff on the Behalf of the Defendant and his Partner; and that the Defendant promiſed to repay the Money out of the firſt Profits he received.

And

Curia. And by the Opinion of the whole Court this Action would not lie.

1. Two Partners being concerned, the Action cannot be brought against one alone; he ought in this Case to have set out the Death of the other: But if Judgment be had against one, the Goods in Partnership may be taken in Execution.

1 Cro. 239. Hob. 180. Rol. Rep. 233. 2. The Promise here was not to pay the Money absolutely, but sub modo; so that the Evidence did not maintain the Action; and the Plaintiff was nonsuited.

Nichols *versus* Ramsel.

Releasé of all Demands *usq;* 26 *Apr.* a Bond dated that Day is not releasé. TRespass done 24 Martii 26 Car. 2. usque 26 Aug. 2. 28 Car. diversis diebus & vicibus, &c.

The Defendant pleaded, That on the 24th Day of April, in the 26th Year of King Charles the Second, he paid the Plaintiff 6 d. which he received in full Satisfaction of all Trespasses usque ad the said 24th Day of April, absque hoc that he was guilty ad aliquod aliud tempus præter prædictum 24 Aprilis anno 26 Car. 2. aut aliquo tempore postea, but leaveth out the 24th Day of April; and for that Reason the Plaintiff demurred, because the Defendant had not answered that Day; for the Word usque excludes it.

Owen 50. 2 Rol. Abr. 521. So where Debt was brought upon a Bond dated 9 Julii, the Defendant pleaded a Releasé of all Actions, &c. the same Day usque diem dati ejusdem scripti, the Bond was not discharged, because the Releasé excludes the 9th Day, on which it was made.

But Serjeant Weston contra. Though generally in Pleading the Word usque is exclusive; yet in the Case of Contracts, because of the Intent of the Parties, 'tis inclusive; and therefore in one Nichol's Case, 20 Car. 2. B. R. Rot. 21. (The Term was not named) a Lease was made Habendum from Lady-day usque Festum Sancti Michaelis, 1665. paying the Rent reserved at Michaelmas during the Term; the Rent shall be paid on Michaelmas-day, 1665. and so the Day shall not be excluded.

So where a Man prescribes to put Cattel from and immediately after Lady-day, where they are to stay till Michaelmas-day; the putting them in on Lady-day, and driving them away on Michaelmas-day, is not justifiable in Strictness, yet it hath been allowed good.

So

So in a Devise the Question was, Whether the Testator was of Age or not; and the Evidence was, That he was born the first Day of January in the Afternoon of that Day, and died in the Morning on the last Day of December: And it was held by all the Judges that he was of full Age, for there shall be no Fraction of a Day.

North Chief Justice said, That Prima facie this is to be intended good; for a Day is but Punctum temporis, and so of no great Consideration.

But the other Three Justices were of Opinion, That the Word Usque was exclusive; and that the Plaintiff should not be put to shew that there was a Trespass done on the 24th of April; and said, That in a Release of all Demands till the 26th of April, a Bond dated that Day is not released; wherefore Judgment was given for the Plaintiff.

Trevil *versus* Ingram.

COvenant to pay an Herriot Post mortem J. S. or 40s. at the Election of the Plaintiff; and sets forth the Death of J. S. and that afterwards he chose to have the 40s. for which he brought this Action, and assigns the Breach for Non-payment.

The Defendant pleaded, that the Plaintiff released to him all Actions and Demands, &c. But this Release was made in the Life-time of J. S and there was an Exception in it of Herriots.

Release of all Demands doth not bar a future Duty. Mod. Rep. 216. 2 Lev. 210.

The Plaintiff demurred, and Serjeant George Strode argued, that this Action was not discharged by that Release, and cited Hoe's Case, 5 Co. 70. where it was held, that a Duty incertain at first, which upon a Condition Precedent was to be made certain afterwards, was but a Possibility which could not be released; that the Duty in this Case was incertain, because the Plaintiff could not make his Election 'till after the Death of J. S.

A Covenant to repair, and a Release pleaded to it within Three Days after the Date of the Indenture: And upon a Demurrer it was held, that it being a future Covenant, and not in Demand at the Time of the Release, although it was of all Demands, yet that Covenant was not thereby released.

2 Cro. 170. Roll. Abr. 407. But a Release of all Covenants in such an Indenture had been a Bar, 5 Co. 71. a.

So here neither the Herriot nor the 40s. were either of them in Demand at the Time of the Release given; and it plainly appears by the Exception in the Release, that it was the Intention of the Parties not to release the Herriots: And of that Opinion was the whole Court; whereupon Judgment was given for the Plaintiff.

2 Cro. 623.

* Sect. 508, 510. 2 Roll. Abr. 408. Sid. 141.

2 Cro. 486.

North, Chief Justice: It is the Opinion of * Littleton, That a Release of all Demands doth release a Rent: And of that Opinion was Justice Twisden in the Argument of Hen *and* Hanson's Case, though it was resolved there, that a Release of all Demands did not discharge a Rent reserved upon a Lease for Years, because such Rent is Executory, and incident to the Reversion, and grows every Year out of the Land; but when it is severed from the Reversion, as by assigning over the whole Term, then it becomes a Sum in gross, and is due upon the Contract, and in that Case a Release of all Demands discharges a Rent afterwards due.

DE

DE
Term. Sancti Hill.

Annis 29 & 30 Car. II. in Communi Banco.

Shambrook *verſus* Fettiplace.

PRohibition. The Queſtion was, Whether a Preſcription be good to an Iſle in a Church which he and all thoſe, &c. uſed to Repair, as belonging to a Manor, where he had no Dwelling-Houſe but only Land; and Serjeant Geo. Croke argued that it was good, and cited the Caſe of Boothby *and* Bayly, where ſuch a Preſcription as this was held to be a good Ground for a Prohibition, Vide Moor Rep. 878. contra.

Preſcription to have an Iſle in a Church becauſe of Repairing, no good Cauſe for a Prohibition. Hob. 69.

The Court inclined that it was not good, but ordered the Prohibition to go, and the Defendant to plead, that it might come judicially before them to be argued.

Daſhwood *verſus* Cooper *& alios. In Cammera Scaccarii.*

ERror of a Judgment in Treſpaſs, wherein Cooper and others brought an Action of Treſpaſs againſt Daſhwood for entring into a Brewhouſe and keeping of Poſſeſſion, and taking away of 50s.

In a Negative Plea, *viz.* That Three did not ſuch a Thing, it muſt be ſaid, *nec eorum aliquis.*

The Defendant pleaded, That the Plaintiffs had committed an Offence againſt the Statute of 12 Car. 2. cap. 23. by which it is enacted, That all Offences thereby prohibited (except in

London) ſhall be heard by Two or more of the next Juſtices of Peace, and in caſe of their Neglect or Refuſal by the Space of Fourteen Days after Complaint made, then the Sub-Commiſſioners of the Exciſe are to determine the ſame, from whom no Appeal doth lie to the Juſtices of the Peace at their next Seſſions, which Commiſſioners of Exciſe, Juſtices of the Peace, and Sub-Commiſſioners, amongſt other Things, are inabled by the ſaid Act to iſſue our Warrants under their Hands, *&c.* to levie the Forfeitures, and ſo juſtified the Entry under a Warrant from the Sub-Commiſſioners, Three Juſtices having refuſed to hear and determine this Offence.

To this Plea the Plaintiffs demurred, and had Judgment in the Court of King's-Bench, and a Writ of Inquiry of Damages was executed, and 750 l. Damages given; and it was alledged, that the Defendant could not move to ſet aſide the Judgment in that Term it was given, becauſe the Writ of Inquiry was executed the laſt Day of the Term, and the Court did immediately riſe; and that he could not move the next Term, becauſe the Judgment was given the Term before the Writ of Error was brought.

The Attorney General therefore ſaid, That this was a hard Caſe, and deſired a Note of the Exceptions to the Plea, which he would endeavour to maintain, which Mr. Pollexfen gave him, and then he deſired Time to anſwer them.

The Exception to the Plea upon which the Judgment was given, was this;

Viz. The Act giveth no Power to the Sub-Commiſſioners to hear and determine the Offences, and ſo to iſſue out Warrants for the Forfeitures, but where the Juſtices or any Two of them refuſe: And though it was ſaid by the Defendant, that Three refuſed, yet it was not ſaid that Two did refuſe; for there is a great Difference betwéen the Allegation of a Thing in the Affirmative and in the Negative; for if I affirm, that A. B. C. did ſuch a Thing, that Affirmation goes to all of them, but Negatively it will not hold; for if I ſay A. B. C. did not ſuch a Thing, there I muſt add nec eorum aliquis.

So if an Action be brought againſt ſeveral Men, and a Nolle proſequi is entred as to One, and a Writ of Enquiry awarded againſt the reſt, which recites, That the Plaintiff did by Bill implead (naming thoſe only againſt whom the Inquiry was awarded, and leaves out him who got the Nolle proſequi); this is a Variance, for it ſhould have bén brought againſt them all.

'Tis

'Tis true, where a Judgment is recited, 'tis enough to mention those only against whom it is had, but the Declaration must be against all; so in a Writ of Error, if one is dead he must be named; and so the Justices ought all to be named in this Case, viz. That the Three next Justices did not hear and determine this Offence, nec eorum aliquis.

Wells *versus* Wright. *In Communi Banco.*

DEBT upon Bond conditioned, That if the Obligée shall pay 20 l. in Manner and Form following, that is to say, 5 l. upon Four several Days therein named; but if Default shall be made in any of the Payments, then the said Obligation shall be void, or otherwise to stand in full Force and Vertue. Bond with an insensible Condition, good.

The Defendant pleads, that tali die, &c. non solvit 5 l. &c. and upon this the Plaintiff demurred.

Barrel Serjeant. The first Part of the Condition is good, which is to pay the Money, and the other is Surplusage void and insensible; but if it be not void, it may be good by transposing thus, viz. If he do pay, then the Obligation shall be void; if Default shall be made in Payment, then it shall be good; and for Authority in the Point, the Case of Vernon *and* Alsop was cited, Hill. 14 Car. 2. Rot. 1786. in B. R. Where the Condition was, That if the Obligée pay 2 s. per Week, until the Sum of 7 l. 10 s. be paid, (viz. on every Saturday) and if he fail in Payment at any one Day, that the Bond shall be void; and upon the like Plea and Demurrer as here, it was adjudged that the Obligation was single, and the Condition repugnant. Sid. 105. 1 Sand. 66. 2 Sand. 79.

The Court were all of Opinion, that Judgment should be given for the Plaintiff; and the Chief Justice said, That he doubted whether the Case of 39 H. 6. 9, 10. was Law.

Brittam

Brittam *verſus* Charnock.

Where the Heir takes by the Will with a Charge, he is a Purchaſer, and the Lands ſhall not be Aſſets.

DEBT upon Bond againſt the Defendant as Heir: Upon Riens per diſcent pleaded, the Jury found a Special Verdict, in which the Caſe was: viz.

The Father was ſeized of a Meſſuage and Three Acres of Land in Fee, and deviſed the ſame to his eldeſt Son, (the Defendant) and his Heirs within Four Years after his Deceaſe, provided the Son pay 20 l. to the Executrix towards the Payment of the Teſtator's Debts, and then he deviſeth his other Lands to be ſold for Payment of Debts, &c. The Father dies, the Son pays the 20 l. and if this Meſſuage, &c. was Aſſets in the Hands of the Defendant, was the Queſtion.

Cro. Car. 161. Cro. Eliz. 431, 833. Vaugh. 271.

That it was not Aſſets (it was ſaid) becauſe the Heir ſhall not take by Deſcent, but by Purchaſe; for the Word Paying is no Condition, if it ſhould, the Heir is to enter for the Breach, and that is the Defendant himſelf; and for that Reaſon it ſhall be a Limitation.

Southcot *and* Stowel, Antea.

'Tis true, where there is no Alteration of the Eſtate the Heir muſt take by Deſcent; but in this Caſe there is an Alteration of the Eſtate from what is directed by the Law, viz. the Manner how he ſhall come by the Eſtate, for no Fee paſſeth to him during the Four Years.

But this was denied by Serjeant Pemberton, for he ſaid, If a Deviſe be of Land to one and his Heirs within Four Years, it is a preſent Deviſe, and if ſuch be made to the Heir 'tis a Deſcent in the mean Time, and thoſe Words (within Four Years) are void; ſo that the Queſtion will be, whether the Word Paying will make the Heir a Purchaſer; and he held it would not: He agreed, that it was uſual to make that Word of Limitation, and not a Condition when the Deviſe is to the Heir; and therefore in a Deviſe to the Heir at Law in Fee he ſhall take by Deſcent, Styles Rep. 148.

But if this be neither a Condition or Limitation, 'tis a Charge upon the Land, and ſuch a Charge as the Heir cannot avoid in Equity.

North Chief Juſtice and Atkins. Where the Heir takes by a Will with a Charge, as in this Caſe, he doth not take by Deſcent, but by Purchaſe, and therefore this is no Aſſets.

Moor

Moor *verſus* Pit.

Surrender of a Copyhold to a Diſſeiſor, whether good to extinguiſh the Right. 1 Ven. 359. T. Jones 153. Cro. Car. 205. 2 Sid. 151. 1 Roll. Abr. 540.

SPecial Verdict in Ejectment; The Caſe was this, viz. A Copyholder for Life, the Remainder for Life, he in Remainder for Life ſurrenders the Copyhold to the Lord Pro tempore (who was a Diſſeiſor only of the Manor) ut inde faciat voluntatem ſuam; the Diſſeiſor grants it to a Stranger for Life, the Diſſeiſee enters, the Stranger dies; and whether the Diſſeiſor, or he in the Remainder for Life who made the Surrender, had the better Title, was the Queſtion.

So that the Point was, Whether this Surrender by a Copyholder in Remainder into the Hands of the Diſſeiſor be good, and ſhall ſo extinguiſh the Right to the Copyhold, that it ſhall not be revived by the Entry of the Diſſeiſee into the ſaid Manor.

It was ſaid, that in ſome Caſes a Surrender into the Hands of a Diſſeiſor was good, that is, when the Surrender is made to him to the Uſe of another and his Heirs, and he admits him; there the Perſon admitted claims not under the Lord, but under the Copyholder who made the Surrender, for nothing paſſes to the Lord, but only to ſerve the Limitation of the Uſe, 1 Roll. Abr. 503. Litt. Q. pl. 1. 1 Inſt. 59. b. 4 Co. 24.

But in this Caſe the Grantee muſt claim from the Lord himſelf, and not from the Copyholder, becauſe he had but an Eſtate for his own Life, with which he wholly departed when he made the Surrender to the Uſe of the Diſſeiſor himſelf.

In Trinity-Term following, this Caſe was argued by Serjeant Maynard on the other Side.

There are Two Sorts of Surrenders of a Copyhold:

1. Proper.
2. Formal and Ceremonious.

If a Surrender be to the Lord to the Uſe of another, this is no proper Surrender; for no Eſtate paſſeth to the Lord, he being only the Inſtrument to convey it to the Surrenderee, and this is but Nominal.

But here the Surrender was to the Uſe of the Lord himſelf, which is a proper Surrender, and in ſuch Caſe 'tis neceſſary that the Lord have a Reverſion, for one Eſtate is to be turned into the other, and there muſt be a continuing of Eſtates.

But Dominus pro tempore, who is a Diſſeiſor hath no ſuch Eſtate: Executor de ſon Tort ſhall ſue, but he cannot retain.

If

If therefore he is not capable to take a Surrender to himself, unless he hath such an Estate, then here is no Disseisin of the Copyhold, 'tis only of the Manor; and then no greater Interest passeth to the Disseisor than to a Stranger, whilst the true Lord had been in Possession, for so he is quoad this Copyhold if he was not disseised of it; for if the Copyholder had the Possession, there could be then no Disseisin; if he was out of Possession, then he had nothing but a Right, and that cannot be surrendred, for it must be an Estate; as if a Lease for Years keep Possession, 'tis the Possession of the Lord, and the Law is the same in case of a Copyhold, 2 Co. Bettisworth's Case.

Piggot *and Lord* Salisbury's *Case*, Antea.

The true Owner makes a Feoffment in Fee; if Lessee for Years continue in Possession, no Freehold passeth.

If Tenant at Will of Parcel of the Manor be in Possession, that prevents a Disseisin of the Freehold, much more in case of a Copyhold.

Lessee for Years, the Remainder to B. for Life, the Remainder to C. in Fee; C. by Deed makes a Feoffment to B. and Livery, &c. 'tis a void Conveyance, because the Possession of Lessee for Years is the Possession of him in the Remainder for Life, and as long as the Lessee for Years is in the Possession, the Owner of the Inheritance cannot be out, Lit. 324. cap. Attornment.

North, Chief Justice, and Wyndham enclined that the Surrender was not good, for it was a material Distinction where the Surrender was made to the Use of a Stranger, and where it terminates in the Lord; that a Surrender made by a Copyholder for Life could not transfer, but extinguish his Right, for he could not give a greater Estate than he had; that there must be a Reversion in the Lord to make a Surrender to him to be good; and that if a Copyholder keeps in Possession, there could be no Disseisin.

But Justice Atkins contra That this Surrender must have Operation to extinguish his Right; for though a Copyholder for Life cannot surrender for longer Time than his own Life, yet if a Surrender be made of such a Copyhold to an Use, 'tis good, and works by way of Extinguishment of his Right, though the Use be void; and if a Copyholder of Inheritance surrender to a Disseisor, ut faciat Voluntatem, who regrants to the said Copyholder an Estate in Tail according to the Surrender, this shall bind the Disseisee, 1 Roll. Abr. 503. pl. 3. Tamen quære.

The

The Copyholder in this Case might have sold his Estate to the Disseisor, and it had been good; and though the Acts of a Disseisor shall not prejudice the Disseisee, yet he could see no Reason why the Copyholder, who had parted with his Estate, should have it again.

Taylor *versus* Biddal.

Special Verdict in Ejectment: The Case was thus; Richard Ben was seised in Fee of the Lands in Question, and had a Sister named Elizabeth, formerly married to one Smith, by whom she had Issue Augustine Smith, now Lessor of the Plaintiff, and she afterwards married one Robert Wharton, by whom she had Issue a Son called Benjamin, and a Daughter called Mary, the now Defendant.

Devise till he be of Age, then to him in Fee, he died within Age, yet a Fee vested in him presently.

Richard Ben devised these Lands to Elizabeth his Sister and Heir, for so long Time, and until her Son Benjamin Wharton should attain his full Age of 21 Years; and after he shall have attained his said Age, then to the said Benjamin and his Heirs for ever; and if he die before his Age of 21 Years, then to the Heirs of the Body of Robert Wharton, and to their Heirs for ever, as they should attain their respective Ages of 21 Years.

Richard the Testator dies, Benjamin died before he came to the Age of 21 Years, living Robert Wharton his Father, afterwards Robert died.

And the Question was, Whether the Lessor of the Plaintiff as Heir to Elizabeth, or Mary, either as Heir to her Brother Benjamin, or as Heir of the Body of Robert, should have this Land?

Ex parte Quer.

This Case was argued by Serjeant Pemberton this Term, and by Serjeant Maynard in Easter-Term following for the Plaintiff, and they held that Augustine Smith, the Lessor of the Plaintiff, should have this Land, because no Estate vested in Benjamin Wharton, he dying before he had attained his Age of 21 Years, and the Testator had declared, that his Sister should have it till that Time, and then, and not before, he was to have it; so that if he never attained that Age (as in this Case he did not) the Land shall descend to the Heir of the Testator; that Elizabeth had only an Estate for Years, and so having no Freehold, the Contingent Remainder could not be supported; that Mary could not take by Way of Executory Devise, because Robert was living when his Son Benjamin died within Age; that therefore 'tis quasi a Condition Precedent, Grant's Case, 10 Co. cited in Lampet's Case. 1 Leon. 101.

There is a Difference between Boraſton's Caſe and this at the Bar, for that was a Deviſe to Executors till Hugh ſhall attain his Age of 21 Years, and the mean Profits in the mean Time to be applied by them for Payment of the Teſtators Debts; and becauſe he might have computed how long it would be before his Debts could be paid, therefore it was adjudged, that after the Death of Hugh within Age, the Executors ſhould continue in Poſſeſſion till Hugh might have attained his full Age had he lived, and ſo a preſent Deviſe to them.

But here the Deviſe is generally till Benjamin Wharton ſhall attain his Age of 21 Years, ſo that nothing veſted in him until that Time, and he dying before, then the Eſtate ſhall deſcend to the general Heir, who is the Plaintiff.

2. Admitting this ſhould be taken as an Executory Deviſe, there muſt be ſome Perſon capable to take when the Contingency happens; and there was no ſuch Perſon in this Caſe, for Robert was alive when Benjamin died, and Mary could not then take as Heir of his Body, for Nemo eſt Hæres viventis; like the Caſe of * Pell *and* Brown, *viz.* Brown had Iſſue William and Thomas, he deviſes Land to his youngeſt Son Thomas, and his Heirs; and if he die (living William), then to William and his Heirs; Thomas did die without Iſſue (living William), and it was adjudged, That if thoſe Words (living *William*) had been left out of the Will, Thomas would have a Fee-Tail, which he might have docked by a Common Recovery; but by Reaſon of thoſe Words he had only a limited Fee, becauſe the Words (viz. If he died without Iſſue) are not indefinite to create a Tail, but are reſtrained to his dying without Iſſue (living *William*), which is a limited Fee; and his Eſtate being determined, William then had a Fee; but if he had died before the Contingency happened, viz. in the Life-time of Thomas, and then Thomas had died without Iſſue, the Heirs of William would not have an Eſtate in Fee for the Reaſons aforeſaid.

2 Cro. 590. Vaugh. 272.

If therefore nothing veſted in Benjamin Wharton, nor in Mary his Siſter, then the Land deſcends to Auguſtine Smith as Heir at Law to Elizabeth, who was Heir to the Teſtator, and ſo the Plaintiff hath a good Title.

Ex parte Def.

Newdigate Serjeant contra. Here is only an Eſtate for Years in the Siſter of the Teſtator, and an Eſtate in Fee preſently veſted in Benjamin Wharton; and he relied upon Boraſton's Caſe, where the Father having Iſſue, Humfry and Henry, deviſed to his Executors till Hugh his Grandſon, the Son of Henry, ſhould be of Age, and then to him in Fee; it was there adjudged, that the Executors had a Term till Hugh might have attained his full Age, and that though

though he died at the Age of Nine Years, yet the Remainder did immediately vest in him in Possession upon the Death of his Grandfather, and that by his dying without Issue the Lands did descend to his Brother.

So here the Fee descends to Benjamin Wharton in Possession, and he dying without Issue, and within Age, the Land shall then descend to his Sister and Heir.

The like Judgment was given in the Case of Taylor *and* Wharton about 12 Years since; and in Dyer, 124. a. A Devise to his Wife, 'till his Son shall be of the Age of 24 Years, then to the Son in Fee, and if he die before 24 Years without Issue, then to the Wife for Life, the Remainder to A. &c. The Testator died. It was adjudged that the Son had a Fee-Simple presently, for an Estate-Tail he could not have till he was 24 Years old; and after the Death of his Father there was no particular Estate to support that Estate in the Remainder till he should come to the Age of 24 Years, so that he took by Descent immediately. 2 Leon. 11. pl. 16. Dyer 354. a.

So here a Fee vested in Benjamin presently, and he being dead within Age, Mary may take as Heir; however when she is of Age, she shall take as Heir of the Body of Robert by Way of Executory Devise arising out of the Estate of the Devisor, which needs no particular Estate to support it, as in Case of a contingent Remainder; for before Mary was of Age, Robert her Father was dead, and so she might well take, Trin. 19 Car. 2. in B. R. Snow *versus* Cutler, Rot. 1704. Stiles 240. Owen 148.

North Chief Justice. Favourable Distinctions have been always admitted to supply the Meaning of Men in their last Wills; and therefore a Devise to A. till he be of Age, then to B. and his Heirs; this is an Estate for Years in A. with a Remainder in Fee to B. And if such a Devise to A. who is also made Executor, or for Payment of Debts, it shall be for a certain Term of Years, viz. for so long as according to Computation he might have attained that Age had he lived. Curia.

Contingent Remainders are at the Common Law, and arise upon Conveyances as well as Wills; one may limit an Estate to A. the Remainder to another; and so it may be by Devise, if the Intent of the Parties will have it so.

But as at the Common Law all Contingent Remainders shall not be good, so in Wills no such Latitude is given, as if none could be bad; they are subject to the same Fate in Wills as in Conveyances.

In this Caſe Elizabeth had a Term till Benjamin Wharton be of Age, for ſhe is Executrix; ſhe was likewiſe Heir at Law to the Deviſor, and this Land had gone to her, had it not been for this Will; ſo that 'tis plain the Teſtator never intended that a Fee-Simple ſhould veſt in her, but ſomewhere elſe; for he could never intend the Deſcent of the Inheritance to that Perſon to whom he had deviſed the Term.

It has been argued, That Mary is Heir at Law to Benjamin, as well as Heir of the Body of Robert, and ſo if ſhe can take either Way 'tis good; but to make her Heir to Benjamin, 'tis neceſſary that the Eſtate veſt in him before he comes to 21 Years; and for that, Boraſton's Caſe was much relied on, which was alſo ſaid not to differ from this at the Bar; that an Eſtate paſſes to Benjamin Wharton in præſenti, and that there was no Incapacity for Mary to take by Way of Executory Deviſe, as was urged on the other Side, and therefore why ſhould ſhe not take by Way of Executory Deviſe as Heir of the Body of her Father, or at leaſt as Heir of Benjamin her Brother?

An Executory Deviſe needs no particular Eſtate to ſupport it, for it ſhall deſcend to the Heir till the Contingency happen; 'tis not like a Remainder at the Common Law, which muſt veſt eo inſtanti that the particular Eſtate determines; but the Learning of Executory Deviſes ſtands upon the Reaſons of the old Law, wherein the Intent of the Deviſor is to be obſerved: For when it appears by the Will, that he intends not the Deviſee to take but in futuro, and no Diſpoſition being made thereof in the mean Time, it ſhall then deſcend to the Heir till the Contingency happen; but if the Intent be that he ſhall take in præſenti, and there is no Incapacity in him to do it, he ſhall not take in futuro by an Executory Deviſe.

Sid. 153. pl. 2. A Deviſe to an Infant in ventre ſa mere is good, and it ſhall deſcend to the Heir in the mean Time; for the Teſtator could not intend he ſhould take preſently, he muſt firſt be in rerum natura.

3 Co. 20. a. 1 Inſt. 378. a. If an Eſtate be given to A. for Life, the Remainder to the right Heirs of B. this is a contingent Remainder, and ſhall be governed by the Rules of the Law; for if B. die during the Life of A. 'tis good; but if he ſurvive 'tis void, becauſe no Body can be his right Heir whilſt he is living; and there ſhall be no Deſcent to the Heir of the Donor in the mean Time to ſupport this contingent Remainder, that ſo when B. dies, his right Heirs may take.

In this Caſe a Fee did veſt in Benjamin preſently, and therefore after his Death without Iſſue the Defendant is his Heir, and

and hath a good Title, if not as Heir at Law, yet she may take by Way of Executory Devise as Heir of the Body of her Father; which though it could not be whilst he was living, (because nemo est Hæres viventis,) yet after his Death she was Heir of his Body, and was then of Age, at which Time, and not before, she was to take by the Will.

That Elizabeth, the general Heir, had only an Estate for Years, till Benjamin should or might be of Age: And so by the Opinion of the whole Court Judgment was given for the Defendant.

Evered *versus* Hone.

SPecial Verdict in Ejectment; wherein the Case was thus, viz. A Man hath Issue Two Sons, Thomas his eldest, and Richard his youngest Son.

Thomas hath Issue John.

Richard hath Issue Mary.

The Father devised Lands to his Son Thomas for Life, and afterwards to his Grandson John, and the Heirs Males of his Body; and if he die without Issue-Male, then to his Grandaughter Mary in Tail, and charged it with some Payments, in which Will there was this Proviso; viz. Provided if my Son *Richard* should have a Son by his now Wife *Margaret*, then all his Lands should go to such First Son and his Heirs, he paying as *Mary* should have done. Construction of Words in a Devise.

Afterwards a Son was born; and the Question was, Whether the Estate limited to Thomas the eldest Son was thereby defeated. And the Court were all clear of Opinion, that this Proviso did only extend to the Case of Mary's being intituled, and had no Influence upon the First Estate limited to the eldest Son.

Anonymus.

IN the Exchequer Chamber, before the Lord Chancellor, the Lord Treasurer, and Two Chief Justices, the Case was thus: viz. The Plaintiff had declared against the Defendant as Executor of Edward Nichols, who was Executor of the Debtor. Executor of an *Executor de son Tort* not liable at Law.

The Defendant pleads, That the Debtor died intestate, and Administration of his Goods was granted to a Stranger, absque hoc, that Edward Nichols was ever Executor, but doth not say, or ever administred as Executor, for in Truth he was Executor de son Tort.

The

The Plaintiff replies, That before the Adminiſtration granted to the Stranger, Edward Nichols poſſeſſed himſelf of divers Goods of the ſaid Debtor, and made the Defendant Executor, and died; and the Defendant demurred; and Judgment was given for the Plaintiff, but reverſed here; for an Executor of an Executor de ſon Tort is not liable at Law, though the Lord Chancellor ſaid he would help the Plaintiff in Equity.

But here Adminiſtration of the Goods of the Debtor was granted before the Death of the Executor de ſon Tort, ſo his Executorſhip vaniſhed, and nothing ſhall ſurvive.

The Lady *Wyndham*'s Caſe.

IF Flotſam come to Land, and is taken by him who hath no Title, the Action ſhall not be brought at the Common Law, and no Proceedings ſhall be thereon in the Court of Admiralty; for there is no need of Condemnation thereof as there is of Prizes: By the Opinion of the whole Court of Common Pleas.

Roſe *verſus* Standen.

Action where miſconceived by the Plaintiff, and Verdict againſt him no Bar to a new Action.

IN Accompt for Sugar and Indigoe; the Defendant pleaded, That the Plaintiff brought an Indebitatus aſſumpſit, a Quantum meruit, and an Inſimul computaſſet, for 100 l. due to him for Wares ſold; to which he pleaded, Non aſſumpſit; and that there was a Verdict againſt him; and then avers, That the Wares mentioned in that Action are the ſame with thoſe mentioned here in the Action of Accompt: The Plaintiff demurred, and it was ſaid for him, That he had brought his former Action on the Caſe too ſoon; for if no Accompt be ſtated, the Action on the Caſe on the Inſimul computaſſet will not lie, and ſo the former Verdict might be given againſt him for that Reaſon.

Ex parte Def.

But on the contrary, the Defendant ſhall not be twice troubled for the ſame Thing; and if the Verdict had been for the Plaintiff, that might have been pleaded in Bar to him in a new Action.

Curia. 2 Cro. 284.

But the Court were of another Opinion, That this Plea was not good, and that if the Plaintiff had recovered, it could not have been pleaded in Bar to him; for if he miſconceives his Action, and a Verdict is againſt him, and then brings a proper Action, the Defendant cannot plead that he was barred to bring ſuch

such Action by a former Verdict, because where 'tis insufficient it shall not be pleaded in Bar; as in Debt upon Bond the Defendant pleaded another Action upon the same Bond, and the Jury found Non est factum; The Entry of the Verdict was, that the Defendant should recover Damages, & eat inde sine die, but not quod querens nil capiat per Breve, so no Judgment to bar him, 2 Cro. 284. Antea. Putt *and* Roster, Postea. Rosal *and* Lamper, Ante.

But pending one Action another cannot be brought, for they cannot both be true.

If no Accompt be stated, the Action on the Case upon an Insimul computasset would not lie; the Insimul computasset implies an Accompt; and upon Non assumpsit pleaded, the Defendant might have given Payment in Evidence, and for that Reason the Jury might find for him. 'Tis true, he might have pleaded Plene computavit, which is the general Plea: But it may as well be presumed that the Verdict was against the Plaintiff, because the Action would not lie; and the Matter being in dubio, the Court will intend it against the Pleader, he not having averred to the contrary, and so they held the Plea to be ill.

DE

DE
Termino Paſchæ.

Anno 30 Car. II. in Communi Banco.

Osborn *verſus* Wright.

ACtion on the Caſe for Words, Viz. The Plaintiff declares that ſhe was unmarried, but about to marry one J. S. and that the Defendant, to hinder her Marriage, ſpoke theſe Words of her, Viz. She is a Whore, a Common Whore, and *N.*'s Whore; per quod Maritagium amiſit. The Jury found the Defendant guilty of ſpeaking the Words, but that ſhe did not loſe her Marriage thereby; and it was moved in Arreſt of Judgment that theſe Words are not actionable, being only Scolding; and of that Opinion was all the Court, and Judgment was arreſted.

Hambleton *verſus Juſtice* Scroggs *& alios, in Camera Scaccarii.*

Serjeant at Law, whether Priviledge to be ſued only in the *Common-Pleas.* 2 Levinz. 129.

AN Aſſault and Battery was brought againſt the Defendants in the Kings-Bench; to which one of them pleaded, that he was a Serjeant at Law, and ſo ought to have his Priviledge to be ſued by Bill in the Common-Pleas, and in no other Court: To this Plea, the Plaintiff demurred; and Judgment was given in my Lord Chief Juſtice Hale's Time, by the Opinion of him and the whole Court of King's-Bench, That a Serjeant at Law might be ſued there, and was not ſuable in the Court of Common-Pleas only.

2. That in this Action the Defendant ſhould not have his Priviledge, becauſe it was brought againſt him and another.

And afterwards a Writ of Error was brought upon this Judgment, returnable before the Lord Chancellor and Chief Juſtices

of the King's-Bench and Common-Pleas, and the Errors were argued before the Two Chief Juſtices at Serjeants-Inn in Chancery-Lane.

Mr. Holt for the Plaintiff in the Writ of Error, That a Serjeant at Law is to be ſued only in the Court of Common-Pleas, and not elſewhere, becauſe there is an abſolute Neceſſity of his Attendance there: He is ſworn, and no other Perſon can plead at that Bar; and therefore if he ſhould be ſued in any other Court, it would be an Impediment to the Buſineſs of that Court, where not only the Officers but their Servants have Priviledge. Ex parte Quer. Vaugh. 155.

In the 11th of E. 4. 2. there was ſome Diſcourſe about the Priviledge of Serjeants at Law, where it was held that he is not to be ſued in that Court by Bill, but by Original; but either Way he is to have his Priviledge. So the Servant of an Officer is not to be ſued by Bill, but he is ſtill to have the Priviledge of the Court, and ſo had Serjeant Hedley's Clerk in the Reign of King Charles the Firſt. Cro. Car. 84.

The Serjeants receive a kind of Induction to the Bar, and have a Place aſſigned them; and that they ought to have Priviledge, the very Words of the Writ are obſervable, Viz. (mentioning a Serjeant at Law) ex Officio incumbit in Curia illa.

And though it hath been ſaid and given as an Anſwer to that Caſe in Cro. Car. That where the Serjeant's Clerk was arreſted in an Inferior Court (as in that Caſe he was) there he ſhall have Priviledge, but not againſt the other great Courts in Weſtminſter-Hall; this is a Difference never yet taken Notice of in any Book, nor doth the Writ warrant this Diſtinction.

2. He ſhall have his Priviledge though he be joined with another, becauſe the Action is joint and ſeveral, and the one may be found guilty and the other acquitted; and it would be an eaſy Way to ouſt a Man of his Priviledge, if it might be done by joining him with another who hath none, 14 H. 4. 21.

But the Perſon with whom the Serjeant is joined may be ſued in the Common-Pleas likewiſe, ſo that he ſhall not hinder him from having Priviledge who of Right ought to have it, 10 E. 4. 15.

Offley contra. As to the Firſt Point, the Court of King's-Bench agreed, That a Serjeant at Law ſhall always have the Priviledge of the Court of Common Pleas againſt all Inferior Courts, but not againſt the other Courts in Weſtminſter-Hall, for he may be ſued in any of them. Ex parte Def.

A Serjeant is not like the Common Officers of the Court, for they are to be attendant there, and no where elſe; but a Serjeant at Law is not confined to that Court alone, he may be aſſigned of Council in any other Court, and doth uſually put his Hand to Pleas, both in the Kings-Bench and the Exchequer; but a Philazer or Attorney of that Court cannot practiſe in his own Name in any other.

All Caſes of Priviledge ought to be taken ſtrictly: And that which was cited concerning the Priviledge of a Serjeant's Clerk is not like this, becauſe the Arreſt was in an Inferior Court.

In the 11 E. 4. 2. b. The Chief Juſtice of the King's-Bench came to the Common-Pleas Bar, and told a Serjeant who he had aſſigned for a Pauper, That if he would not come into that Court and plead for his Client, he would forejudge him; ſo that if he could be fetch'd out of the Common-Pleas and carried to the King's-Bench, he is not confined to that Court alone.

In the 5 H. 5. nu. 10. Complaint was made that the Subjects of the King were not well ſerved in his Courts; the Parliament thereupon ordered, That one Martin and others ſhould take upon them the Dignity of Serjeants at Law; ſo that it appears that their Buſineſs lies in other Courts, as well as in that of the Common-Pleas.

2. As to the Second Point: Here is a joint Action for any Thing that appears to the contrary, and the Plaintiff may proceed againſt one in the King's-Bench, and therefore the other ſhall be ouſted of his Priviledge (if he have any) in the Common-Pleas, Moor, 556. 20 H. 6. 32.

2 Rol. Abr. 275. pl. 4.

North Chief Juſtice ſaid, That he always took it to be an uncontroverted Point, That a Serjeant at Law ſhould be ſued only in the Court of Common-Pleas by Bill; he is bound by Oath to be there, and when he brings a Writ of Priviledge, 'tis always out of that Court, and no other: Curia adviſare vult.

The

The Attorney-General *verſus Sir* John Read. *In Scaccario.*

INformation. A Special Verdict was found: The Caſe was thus:

Viz. Sir John Read, 1 Apr. 24 Car. 2. was by Sentence in the Spiritual Court divorced a Menſa & Thoro, and for Non-Payment of Alimony was excommunicated.

Afterwards it was Enacted by the Statute of 25 Car. 2. cap. 2. That all and every Perſon or Perſons who ſhall have any Office, Civil or Military, ſhall take the Oaths of Supremacy and Allegiance, and receive the Sacrament (within the Time limited by the ſaid Act) or otherwiſe ſhall be adjudged *ipſo facto* incapable and diſabled by Law, or if he execute any Office after his Neglect or Refuſal to qualify himſelf within the Time therein appointed, (viz. Three Months) then he ſhall be diſabled to ſue in any Court, and ſhall forfeit the Sum of 500 l.

Sir John Read was made High-Sheriff of Hartfordſhire, 12 Novemb. 25 Car. 2. and being ſtill under the Sentence of Excommunication, he took upon him the Office, and executed it for 3 Months, viz. to the 12th Day of February afterwards, and then refuſed to ſerve any longer; the Judges came ſoon after to keep the Aſſiſes for that County, but there was no Sheriff there to attend them, and the Reaſon was, becauſe if he had executed the Office without taking the Oaths (the Time being now expired, wherein he ought to have taken the ſame,) then he had ſubjected himſelf to the Forfeiture of 500 l. and he could not receive the Sacrament becauſe he was Excommunicated, and therefore ſuppoſed that after the 3 Months he was ipſo facto diſcharged by the aforeſaid Statute; and whether upon all this Matter the Defendant be guilty, was the Queſtion.

Diſability by a Statute ought to be removed by the Party to enable himſelf to execute an Office. 2 Ven. 237, 238.

Ward and Sir William Jones the Attorney-General argued, that the Defendant was guilty.

1. The Oath and Sacrament are neceſſary Qualifications for all Sheriffs, becauſe the Act appoints theſe Things to be done, and the Penalty therein extends to thoſe who execute any Office after the Three Months, without doing the ſame, but not to ſuch who neglect to qualify themſelves.

And though it may be objected, that the Act gives no Penalty for not taking of the Oath, it only enjoins it to be done, and ſub-

jects the Perſon to the Forfeiture of 500 l. for executing an Office after Three Months, that being not done; ſo that this is not to be puniſhed by Information, it being no Offence at the Common Law; yet if an Act appoints a Thing to be done, the Tranſgreſſing of the Law is an Offence at the Common Law, and ought thus to be puniſhed; and ſo it was adjudged in Caſtle's Caſe, 2 Cro. 643.

1 Roll. Abr. 251. 455. Suppoſe the Defendant had given Bond to perform a Thing, a Diſcharge by the Act of God, or by the Obligee, had been good, but the Obligor ſhould never diſable himſelf; and if it be ſo in private Contracts, much more in the Caſe of the King, becauſe our Duty to him is of the higheſt Nature.

2. Therefore the Excommunication can be no Excuſe to the Defendant: For though he might have been excuſed if he had been under a legal Diſability, which he could in no wiſe prevent; yet here he was able, and had Time enough, and it was in his Power to have diſcharged himſelf from this Excommunication, and being bound by his Duty and Allegiance to the King to perform the Office, he ought to qualify himſelf for the Performance, and either to remove the Diſability, or ſhew he had not Power to do it. 'Tis his Obſtinacy that diſables him; and 'tis abſurd to think that this Excommunication, which was deſigned as a Puniſhment, ſhould now be an Eaſe to him, to excuſe him from executing this Office, Moor 121. Lacie's Caſe.

3. That the Defendant is puniſhable for this Neglect, otherwiſe the King would loſe the Effect of his Subjects Service, if it ſhould be in their Power to diſcharge themſelves at Pleaſure; an Act of Parliament cannot, and much leſs the Defendant himſelf by his own Act take away his Duty and Service which he oweth to the King: And therefore, though 'tis Enacted, That a Sheriff ſhall be only for one Year, yet it has been adjudged that the King by a Non obſtante may diſpenſe with that Statute, becauſe otherwiſe he would be deprived of the Service of his Subjects. Antea.

If a Sheriff, when he is firſt admitted into his Office, refuſes to take the Oath of his Office, he is finable, and ſo he ought here; if any Alteration be made by the King of that Oath, his Diſobedience afterwards is puniſhable, though a Form of the Oath is preſcribed by the Act of Parliament; and there is no other Way to puniſh the Defendant in this Caſe but by Information, for after the Three Months (in caſe he execute the Office not being qualified) the Act gives the Penalty to the Informer; and if he ſhould not execute it, the Inconvenience would be great, becauſe 'tis an Office which concerneth the Adminiſtration of Juſtice, Cro. Car. 26.

and

and neceſſary for the Management and Collection of the King's Revenue.

The Statute extends to Offices of Truſt as well as of Profit, and enjoins the Thing to be done, the Tranſgreſſion whereof is an Offence, as well at the Common Law as againſt the Statute, and ſo puniſhable by Information, and therefore they prayed Judgment againſt the Defendant.

Sawyer and Levins contra. Viz. They agreed, if the Subject be qualified he ought to accept the Office, but the Defendant was not ſo qualified, and therefore to be excuſed. But before they entered upon the Debate, whether this was an Offence or not, they took an Exception to the Form of the Information. Ex parte Def.

Viz. That it was not good, becauſe it did not conclude contra formam Statuti; for if the Offence be at the Common Law, and a new Penalty is given by the Statute, the Proceedings ought to be either at the Common Law by Way of Fine, or upon the Statute for the Penalty; but if the Offence be by the Statute, then it muſt be laid to be contra formam Statuti. Now if this was any Offence in the Defendant, it was becauſe he did not receive the Sacrament and take the Oath, which is an Offence againſt the Statute, and therefore ought to conclude contra formam Statuti, which is eſſential. Then as to the Subſtance;

1. The Information is inſufficient, for there is no Offence at all of which the Common Law doth take Notice; and though the Conſequences of the Thing done may be bad, yet no Man ſhall be puniſhed for that, becauſe thoſe only aggravate the Offence, if any; neither is this Information true, for it ſaith he refuſed abſque rationabili cauſa, but here was a reaſonable Cauſe: And though it may be objected, that it was only impotentia voluntatis; and that every Subject being diſabled, is to remove that Diſability to ſerve the King, this was denied; for a Man who is a Priſoner for Debt is not bound or compellable to be Sheriff, neither is a Man bound to purchaſe Lands to qualify himſelf to be either a Coroner or Juſtice of the Peace. By the Statute of 3 Jac. every Recuſant is diſabled; he may conform, but he is not bound to it, for if he ſubmits to the Penalty, 'tis as much as is required by Law. 'Tis true, a Subject is bound to ſerve the King in ſuch Capacity as he is in at the Time of the Service commanded, but he is not obliged to qualify himſelf to ſerve in every Capacity: Neither doth it appear in this Caſe, that the Defendant was able to remove this Incapacity, and that ſhould have been ſhewn on the other Side, and all Judges are to judge upon the Record.

The

The Intent of the Statute is, That if Persons will not qualify themselves, they shall not execute any Office, and it was made to keep Roman Catholicks out of Places, but not to force them to accept of Offices of Trust in the Government; and it designs no Punishment for quitting, but for executing of a Place contrary to the Law; but if this be an Offence, this Information will not lie; and for that,

2. It was argued, That if a Thing be either commanded or forbidden by a Statute, the Transgression in either Case is an Offence punishable by Information; but when an Act doth not generally command a Thing, but only sub modo, the Party offending is punishable no otherwise than designed by that Law; as where the Statute of 18 H. 6. cap. 11. prohibits any Man from being a Justice of the Peace, unless he have 40 l. per An. and the Statute of 5 & 6 E. 6. cap. 16. which makes such Bargains as are therein mentioned about buying of Offices void, if such Office be forfeitable, then an Information will lie; but when 'tis ipso facto void, as in both the former Cases, then 'tis otherwise, because the Punishment is executed by the Statute it self; and therefore where the Avoidance is made by the Act, there is no Need of an Information.

25 H. 6. pl. 9. b.
7 H. 4. 5.

And the Objection of Impotentia voluntatis is not material to this Purpose, because Simony, buying of Offices, not subscribing the 39 Articles, according to the Statute of the Queen; these are all voluntary Acts, yet no Information lies against such Offenders, because the Statutes execute the Punishment.

The Intent of the Parliament is here declared, the Disability of the Person makes the Office void; void to all Intents, for the Right of Infants or Men in Prison is not saved; so that admitting it to be an Offence if the Duty be not performed, yet if such a Qualification be requisite to make a Man to act in such an Office, or perform such a Duty, if that Qualification be wanting, the Party is only punishable by the Loss of the Office.

The Act doth not distinguish between Offices of Trust and Profit: And as to the other Objection, viz. That 'tis in the Power of the Defendant to qualify himself, the same might as well be objected against all the Popish Recusants, upon the Statute of 3 Jac. and if a Statute doth disable Persons, or abridge the King of their Services, there is no Injury done, because the King himself is Party to the Act; but if Mischiefs were never so great, since they are introduced by a Law, they cannot be avoided till that Law is changed.

3. But admitting the Information to be good, and that this is an Offence for which it will lie, yet the Excommunication is a

suffi-

ſufficient Excuſe; it appears by the Verdict that the Defendant was abſolutely diſabled to be Sheriff, for if he is to take the Oath and receive the Sacrament in order to it, if he cannot be admitted to the Sacrament, as being under the Sentence of Excommunication, that is an Excuſe.

The Defendant is only argued into a Guilt, for the Jury have not found any; they do not ſay, That it was in his Power to yield Obedience, or that he might have enabled himſelf; they only find his Incapacity; and though it was a voluntary Act, which was the Cauſe of his Diſability, yet in ſuch Caſes the Law doth not look to Cauſes ſo remote. If a Man be in Priſon for Debt, it is his own Act for contracting it and not paying, but yet an Outlawry againſt him whilſt in Priſon ſhall be reverſed, becauſe the immediate Cauſe, viz. the Impriſonment; and the Judgment was in invitum, and the Law looks no farther; and ſo Judgment was prayed for the Defendant.

But the Court were all of Opinion, that this Information would lie, and that the Defendant was puniſhable for not removing the Diſability, it being in his Power to get himſelf abſolved from the Excommunication: And ſo Judgment was given againſt him, and a Writ of Error brought, &c.

Godfrey *verſus* Godfrey. *In Communi Banco.*

Intrat' Hill. ult. Rot. 321.

DEBT upon a Bond for Performance of an Award, in which the Arbitrators had taken notice of 72 l. in Controverſy, and had awarded 50 l. in Satisfaction: The Defendant pleads Nullum fecerunt Arbitrium; the Plaintiff replies an Award, and ſets it forth and aſſigns a Breach; to which the Defendant demurred, becauſe it appeared by the Award that 72 l. was in Controverſy for Rent due, and that 50 l. was awarded in full Satisfaction of 72 l. and general Releaſes to be given; but it did not appear that any other Matter was in Controverſy between the Parties, though the Submiſſion was general; and Arbitrators may reduce incertain Things to a Certainty, but they cannot make a Debt certain to be leſs, except there were other Differences for which likewiſe this Releaſe was to be given, 10 H. 7. 4. Award of a leſſer Sum in Satisfaction of a greater, and good.

But the whole Court were of Opinion that the Award was good, for that the Arbitrators might conſider other Matters between the Parties; Curia.

Parties; neither did it appear by the Award that the 72 l. was due, but in Demand only; and 'tis unreaſonable for him to find Fault with his own Eaſe; for he alledges that he ought to pay 72 l. and complains becauſe the other Party is contented with 50 l. and demands no more. Judgment for the Plaintiff.

Wright *verſus* Bull.

Condition where 'tis Diſjunctive 'tis in the Election of the Party to have either.

DEBT upon a Bond for Payment of 40 l. The Condition whereof was, That if the Defendant ſhould work out the ſaid 40 *l.* at the uſual Prices in Packing, when the Plaintiff ſhould have Occaſion for himſelf or his Friends to employ him therein, or otherwiſe ſhall pay the 40 *l.* then the Bond to be void.

Basket *and* Basket, antea.

The Defendant pleads, That he was always ready to have wrought out the 40 l. but that the Plaintiff did never employ him; and upon Demurrer the Plea was held ill, becauſe the Defendant did not aver that the Plaintiff had any Occaſion to make uſe of him; and for that it was at his Election either to have Work or Money, and not having imployed him, but brought his Action, that is a Requeſt in Law; and ſo he hath determined his Election to have the Money; and Judgment was accordingly given for the Plaintiff.

Blackbourn *verſus* Conſet.

Place, where it ſhall be intended, tho' not laid in the Pleading.

IN Replevin, the Avowant pleads an Execution taken out, and that a Term for Years was extended, and an Aſſignment thereof made by the Sheriff, but alledges no Place where the Aſſignment was made: But upon Demurrer it was held good, for it ſhall be intended to be aſſigned where the Land doth lie.

Hall *verſus* Carter.

Bond to render himſelf a Priſoner, good.

Sid. 132. pl. 4.

IN an Action of Debt upon a Bond, the Defendant craves Oyer of the Condition, which was, That if another Perſon, (who was arreſted at the Suit of the Plaintiff, and for whom the Defendant was now bound) ſhould give ſuch Security as the Plaintiff ſhould approve of for the Payment of 90 l. to him, or ſhould render his Body to Priſon at the Return of the Writ, then the Obligation to be void.

The

The Defendant pleads the Statute of 23 H. 6. cap. 10. That this Bond was given pro eaſimento & favore; And this Caſe coming to be argued upon a Demurrer, the Queſtion was, Whether ſuch Bond be within the Statute or not? And the Court were of Opinion that it was not.

If the Sheriff takes Bond in another Man's Name, to elude the Statute, ſuch Bond is void; but the Plaintiff may give Directions to the Officer to take ſuch Bond as this to himſelf; 'tis only an Expedient to prevent a new Arreſt, and the Agreement of the Plaintiff makes it good.

If a Capias be taken out againſt the Defendant, and a Third Perſon gives the Plaintiff a Bond, that the Defendant ſhall pay the Money, or render himſelf at the Return of the Writ; 'tis a good Bond, and not within the Statute, becauſe 'tis not by the Direction of the Officer, but by the Agreement of the Plaintiff, and there is no Law that makes the Agreement of the Parties void; and if the Bond was not taken by ſuch Agreement, it might have been traverſed. T. Jones, 95.

But Juſtice Atkins doubted, becauſe a Bond to render himſelf a Priſoner is void, Bewſages's Caſe, 10 Co. But if it had been to pay the Money, or appear at the Return of the Writ, it had been good: But notwithſtanding Judgment was given for the Plaintiff.

Shaxton *verſus* Shaxton.

Non damnificatus not a good Plea, where the Perſon and Lands are to be indempnified. Antea.

THE Condition of a Bond was, That the Defendant ſhould ſave harmleſs Thomas Shaxton, and the Mortgaged Premiſſes, and ſhould pay the Intereſt for the principal Sum.

The Defendant pleads, That Thomas Shaxton non fuit damnificatus, for that the Defendant had paid the 120 l principal Money, with all the Arrears of Intereſt due at ſuch a Day: And upon a Demurrer this was held no good Plea; becauſe the firſt Matter non damnificatus, goes to the Perſon, and not to the Premiſſes: And ſo Judgment was given for the Plaintiff.

Anonymus.

After Acquittal for a Common Treſpaſs an Action on the Caſe will lie. Sid. 465, 466. Antea.

THE Defendant was indicted for a Common Treſpaſs, and acquitted; and now was Plaintiff in an Action on the Caſe againſt the Proſecutor: And by the Opinion of the Chief Juſtice the Action will lie for the Charges and Expences in defending the Proſecution, which the Acquittal proves to be falſe, and the indicting him proves to be malicious; for if he had intended any Thing for his own Benefit or Recompence, he might have brought a Civil Action, and then if he had been found Not-Guilty, he would have had his Coſts allowed.

Though the Proſecution be for a Treſpaſs for which there is a probable Cauſe, yet after Acquittal it ſhall be accounted malicious; the Difference only is where the Indictment is for a Criminal Matter, but where 'tis for ſuch a Thing for which a Civil Action will lie, the Party can have no Reaſon to proſecute an Indictment, it is only to put the Defendant to Charges, and to make him pay Fees to the Clerk of the Aſſiſes.

Penrice *and* Wynn's *Caſe*.

Habeas Corpus may be granted in Civil Matters.

Antea.

SErjeant Maynard moved for a Habeas Corpus for them, being committed to the Poultry Compter by the Commiſſioners of Bankrupts, for refuſing to be examined and ſworn touching their Knowledge of the Bankrupt's Eſtate: The Proceſs againſt them in this Court, was an Attachment of Priviledge, which was a Civil Plea, and of which the Court had Juriſdiction, and therefore the Habeas Corpus muſt be granted. And the Chief Juſtice ſaid, that it might be without Motion, becauſe all the Habeas Corpus's in that Court were ad faciendum & recipiend' and they Iſſue of Courſe; but in the King's-Bench they are ad ſubjiciendum which are in Criminal Cauſes, and not to be granted without Motion. Then the Serjeant moved that the Sheriff might return his Writ, which was done, and being filed, he took Exceptions to the Return, by which the Ground of the Commitment appeared to be by Vertue of a Warrant under the Hands and Seals of the Commiſſioners, &c. which he ſaid was ill for want of an Averment of their Refuſal to come and be ſworn; for it did not appear that they did refuſe, and they ought not to be committed without refuſing, ſo that ſhould have been poſitively averred, viz. That they did refuſe, and ſtill do; for if they are wil-

willing at any Time, they ought to be diſcharged; and ſo they were, but were ordered to put in Bail upon the Attachment.

Abbot *verſus* Rugeley.

THE Plaintiff declared in an Action of Aſſault and Battery, to which the Defendant pleaded non cul', and at the Aſſiſes a Plea was put in Puis darrein continuance, and a Demurrer thereunto. The Court were clear of Opinion, That if the Plea had been iſſuable, it could not have been then tried, neither could the Demurrer be there argued, but muſt be certified up hither by the Judge of Aſſiſe, as Part of the Record of Niſi prius, Yelv. 180. Hawkins *verſus* Moor.

Plea *Puis darrein continuance* muſt be certified as Part of the Record of *Niſi prius*.

Ballard *verſus* Oddey.

IT was ruled in this Caſe, That to avoid a Security by Reaſon of Uſury, the Contract it ſelf muſt be uſurious, for if the Party takes afterwards more than is allowed, that will not make it ſo; ſo that if the Agreement of the Parties be honeſt, but made otherwiſe by the Miſtake of a Scrivener, yet 'tis not Uſury: As if a Mortgage be for 100 l. with a Proviſo to be void on Payment of 106 l. at the End of one Year, and no Covenant for the Mortgagor to take the Profits till Default be made in Payment, ſo that in Strictneſs the Mortgagee is intituled both to the Intereſt and the Profits; yet if this was not expreſs'd, the Agreement is not Uſury.

The Contract it ſelf muſt be Uſurious to make it void. 1 Sand. 295. Mod. Rep. 69.

DE
Term. Sanctæ Trin.

Anno 30 Car. II. in Communi Banco.

The Case of one *Randal* and his Wife, an Administrator, &c.

Judgment may be avoided without a Writ of Error by a Plea, where the Party is a Stranger to it.

DEBT upon a Bond against the Defendant as Administratoz: They plead a Judgment recovered against the Intestate in Hillary Term, 26 & 27 Car. 2. and that they had not Assets ultra. The Plaintiff replies, That there was an Action against the Intestate, but that he died before Judgment, and that after his Death Judgment was obtained, and kept on Foot per fraudem.

The Defendant traversed the Fraud, but did not answer the Death of the Intestate; and upon a Demurrer it was said for the Plaintiff, that the Judgment was ill, and that he being a Stranger to it, could neither bring a Writ of Error or Deceit, and had no other Way to avoid it, but by Plea; and that 'tis put as a Rule, That where Judgment may be reversed by a Writ of Error, the Party shall not be admitted to do it by Plea; but a Stranger to it must avoid it by Plea, because he is no Party to the Judgment; as if a Scire facias be brought against the Bail, 'tis a good Plea for them to say, That the Principal was dead before Judgment given, by Way of excusing themselves to bring in the Body; but 'tis not good to avoid the Judgment, because 'tis against the Record, which must be avoided by Writ of Error, 1 Roll. Abr. 449. 742.

Cro. Eliz. 199.

The Court were of Opinion, That the Plaintiff might avoid the Judgment without a Writ of Error, especially in this Case, where 'tis not only erroneous, but void.

Hill *versus* Thorn.

IN an Arbitrament it was held by the Court, That if two Things be awarded, the one within, and the other not within the Submission; the later is void, and the Breach must be assigned only upon the first. Rules in an Award.

2. If there be a Submission of a particular Difference, and there are other Things in Controversy, if in such Case a general Release is awarded 'tis ill, and it must be shewed on the other Side to avoid the Award for that Cause.

3. If the Submission be of all Differences till the 10th Day of May, and a Release awarded to be given of all Differences till the 20th Day of May, if there be no Differences between those two Days, the Award is good; if any, it must be shewed in Pleading, otherwise the Court will never intend it. 3 Mod. 264. 1 Sand. 33. 1 Roll. Abr. 257.

4. That reciprocal Covenants cannot be pleaded one in Bar of another; and that in the assigning of a Breach of Covenant, 'tis not necessary to aver Performance on the Plaintiff's Side. Smith *and* Shelbury, Antea.

Staples *versus* Alden.

DEBT upon a Bond conditioned, to deliver Forty Pair of Shoes within a Month at Holborn-Bridge to Henry Knight a Common Carrier to G. for the Use of the Obligee. Tender of Goods to the Man shall be a Tender to the Master.

The Defendant pleaded, That in all that Space of a Month Henry Knight did not come to London, but that such a Day at Holborn-Bridge he delivered Forty Pair of Shoes to A. G. the Carrier's Porter: To this Plea the Plaintiff demurred; for that the Condition being to do something to a Stranger, the Defendant at his Peril ought to perform it; like the Case where the Action of Debt was brought upon a Bond conditioned, that the Defendant should give such a Release as the Judge of the Prerogative Court should think fit; the Defendant pleaded, that the Judge did not appoint any Release, and it was adjudged no good Plea, because the Obligation is on his Part, and he ought to tender a Release to the Judge, Cro. Eliz. 716. 33 H. 6. 13. 4 H. 7. 4.

But on the other Side it was said, That a Delivery to the Servant is a Delivery to the Master himself; and if Parcels of Goods are delivered to the Porter and lost, an Action lies against the Master.

The

Curia. The Court (abſente North Chief Juſtice) held the Plea to be good, and that ſuch a Conſtruction was to be made as was according to the Intent of the Parties, and that a Delivery to the Man was a Delivery to the Maſter; whereupon Judgment was given for the Defendant.

Gillmore *verſus Executor of* Shooter. *In Banco Regis.*

A new Act ſhall not take away an Action to which the Plaintiff was entituled at the Commencement of the Act. T. Jones 108. 2 Lev. 227. 29 Car. 2. c.

INdebitatus aſſumpſit. There was a Treaty of Marriage between the Plaintiff, who was of Kin to the Teſtator, and the Daughter of one Harris, with whom he afterwards had 2000 l. as the Marriage Portion; and Mr. Shooter in his Lifetime promiſed to give the Plaintiff as much, or to leave him worth ſo much by his Will.

This Promiſe was made before the 24th Day of June, before this Action brought; the Marriage took Effect, Harris paid the 2000 l. and Shooter died in September following, having made no Payment of the Money, or any Proviſion for the Plaintiff by his Will.

This Action was commenced after Shooter's Death, and upon the Trial, a Special Verdict was found upon the Act of Frauds and Perjuries, 29 Car. 2. which Enacts, That from and after the 24th Day of *June*, in the Year 1677. no Action ſhall be brought to charge any Perſon upon any Agreement made in Conſideration of Marriage, *&c.* unleſs ſuch Agreement be in Writing, *&c.* And that this was a bare Promiſe without Writing.

And by Wyld and Jones (abſente Twiſden) Judgment was given for the Plaintiff; for it could not be preſumed that the Act had a Retroſpect to take away an Action to which the Plaintiff was then intituled: For if a Will had been made before the 24th Day of June, and the Teſtator had died afterwards, yet the Will had been good, though it had not been in purſuance of the Statute.

After

After *versus* Mazeen. *In C. B.*

IN Covenant, the Plaintiff declared upon an Indenture, in which the Defendant had covenanted that he was seiſed in Fee, &c. and would free the Premiſſes from all Incumbrances, in which there was alſo another Covenant for quiet Enjoyment; and the Breach aſſigned was upon an Entry, and Eviction by another, and concludes, & ſic Conventionem ſuam prædictam fregit, in the Singular Number.

Breach aſſigned did relate to Three Covenants, the Declaration concludes, *& ſic fregit Conventionem*, and good.

And upon a Demurrer to the Declaration, Maynard Serjeant ſaid, That the Breach did relate to all the Three Covenants, and therefore the Concluſion was ill, becauſe he did not ſhew what Covenant in particular, and if he ſhould obtain a Judgment upon ſuch a Declaration, the Recovery could not be pleaded in Bar to another Action brought upon one of the other Covenants.

But Conyers for the Plaintiff ſaid, that Conventio is Nomen collectivum, and if Twenty Breaches had been aſſigned, he ſtill counts de placito quod teneat ei Conventionem inter eos fact': And of that Opinion was the Court; and that the Breach being of all Three Covenants, the Recovery in one would be a good Bar in any Action afterwards to be brought upon either of thoſe Covenants.

Parrington *verſus* Lee.

INdebitatus aſſumpſit, for Money had and received to the Uſe of the Plaintiff, a Quantum meruit for Wares ſold, and an Inſimul computaſſet, *&c.*

Limitation of Perſonal Actions only extends to Accompt between Merchants. Mod. Rep. 268. 2 Sand. 125, 127. Pl. Com. 54.

The Defendant pleads the Statute of Limitations, (viz.) Non aſſumpſit infra ſex annos: The Plaintiff replied, That this Action was grounded on the Trade of Merchants, and brought againſt the Defendant as his Factor, &c. The Defendant rejoins, that this was not an Action of Accompt; and the Plaintiff demurred, for that this Statute was made in Reſtraint of the Common Law; and therefore is not to be favoured or extended by Equity, but to be taken ſtrictly; and that if a Man hath a double Remedy, he may take which he pleaſeth; and here the Plaintiff might have brought an Action of Accompt, or an Action on the Caſe grounded on an Accompt.

But

But Baldwyn Serjeant inſiſted, that the Declaration was not full enough, for the Plaintiff ought to ſet forth, That the Action did concern Merchants Accompts, and that the Replication did not help it.

The Court were of another Opinion; for that it need not be ſo ſet forth in the Declaration, becauſe he could not tell what the Defendant would plead, ſo that ſuppoſing him to be within the Saving of the Act, his Replication is good; and 'tis the uſual Way of Pleading, and no Departure, becauſe the Plea of the Defendant gives him Occaſion thus to reply. But the Saving extends only to Accompts between Merchants, their Factors, and Servants; and an Action on the Caſe will not lie againſt a Bayliff or Factor where Allowances and Deductions are to be made, unleſs the Accompt be adjuſted and ſtated, as it was reſolved in Sir Paul Neal's Caſe againſt his Bayliff.

Where the Accompt is once ſtated, as it was here, the Plaintiff muſt bring his Action within Six Years; but if it be adjuſted, and a following Accompt is added, in ſuch Caſe the Plaintiff ſhall not be barred by the Statute, becauſe 'tis a running Accompt: But if he ſhould not be barred here, then the Exception would extend to all Actions between Merchants and their Factors, as well as to Actions of Accompt, which was never intended, and therefore this Plea is good, and the Saving extends only to Actions of Accompt; whereupon Judgment was given for the Defendant.

Mod. Rep. 71.

Aſtry *verſus* Ballard. *In Banco Regis.*

Principals in Execution, the Bail are liable.
1 Ven. 315.
T. Jones 75.
2 Lev. 195.
2 Cro. 320.
1 Roll. 897.

THE Defendant became Bail for Six Perſons, againſt whom the Plaintiff got a Judgment, and two were put in Execution; the Plaintiff afterwards brought a Scire Facias againſt the Bail, who pleaded that two of the Principals were taken in Execution before the Scire Facias brought; and whether the Bail was not diſcharged thereby, was now the Queſtion.

It was agreed, that if Five had ſurrendred themſelves after Judgment, yet the Bail had been liable; but are not ſo if the Plaintiff (as in this Caſe) hath once made his Election by ſuing out Execution againſt the Principals, and thereupon Two are taken and in Cuſtody. Before the Return of the Second Scire Facias, they have Liberty by the Law to bring in the Principals; but the Plaintiff having taken out Execution, he hath made it now

now impoſſible for the Bail to bring them in to render themſelves.

But Sympſon argued, that the Bail was not diſcharged; for he ought to bring in the other Four, or elſe he hath not perform'd his Recognizance; and ſo it was adjudged by the Court, for the Law expects a compleat Satisfaction. The like Reſolution was in this Court between Orlibear *and* Norris. Sid. 107.

Steed *verſus* Perryer.

IN a Special Verdict in Ejectment, the Caſe was this, viz. Robert Perryer being ſeiſed in Fee of the Lands in Queſtion, had Iſſue two Sons, William his eldeſt, and Robert his youngeſt Son; and being ſo ſeiſed, he deviſes theſe Lands to his youngeſt Son Robert and his Heirs. Republication makes it a new Will.

Robert the Deviſee dies in the Life-time of his Father, and leaves Iſſue a Son named Robert, who had a Legacy deviſed to him by the ſame Will. Jones 135. 1 Ven. 341. Mod. Rep. 267.

The Grandfather afterwards annexed a Codicil to his Will, (which was agreed to be a Republication) and then he expreſly publiſhes the Will de novo, and declared, that his Grandſon Robert ſhould have the Land as his Son Robert ſhould have enjoyed it had he lived. 2 Lev. 243. Raym. 408.

And whether the Grandſon, or the Heir at Law, had the better Title, was the Queſtion.

Pemberton and Maynard Serjeants argued for the Title of the Plaintiff (who was Heir at Law) That if a Deviſe be to S. and his Heirs, if S. die, living the Deviſor, the Heir ſhall take nothing, becauſe no Eſtate veſted in his Anceſtor; ſo if a Deviſe be to the Heirs of S. after his Deceaſe, the Heir ſhall take by Purchaſe, for he cannot take as Heir for the Reaſon aforeſaid.

By the Death of Robert the Son, the Deviſe to him and his Heirs was void, and the annexing a Codicil and Republication of the Will cannot make that good which was void before; if it cannot make it good, then the Heir cannot take by Purchaſe, and by Deſcent he cannot take, for his Anceſtor had no Eſtate, and therefore he ſhall have none.

Beſides, this is not a good Will within the Statute, which requires it to be in Writing: Now the Deviſe by the written

Will was to the Son, and the Republication to the Grandson was by Words and not in Writing; so that if he cannot take by the Words of the Will, he is remediless, and that he cannot take as Heir, because his Ancestor died in the Life-time of the Testator, Moor 353. Cro. Eliz. 243.

Cro. Eliz. 422. Moor 353, 404.

Skipwith and Barrel on the other Side, That the new Publication makes it good, for it makes a new Will in Writing, and it shall take according to the Publication which makes it have the Effect of a new Will. 'Tis true, Deeds shall not be extended farther than the Intent and Meaning of the Parties at the Time of the Delivery, but Wills are to be expounded by another Rule; therefore though by the Death of the Son the Will was void, yet by the Republication it hath a new Life, 1 Roll. Abr. 618. 5 Co. 68. 8 Co. 125.

The Chief Justice, Windham and Atkins Justices, were of Opinion for the Grandson against the Heir at Law, viz. That the Republication made it a new Will, and the Grandson should take by the Name of Son: And Justice Atkins relied on the Case of Brett *and* Rigden in the Commentaries, where new purchased Lands passed by a Republication; but a Writ of Error being brought upon this Judgment in the King's Bench, it was reversed.

Anonymus. *In Banco Regis.*

MR. Sanders moved for a Prohibition to the Spiritual Court in the Case of the Children of one Collet and Mary his Wife, to stay Proceedings there upon a Libel against them; that the said Collet had married Anne, the Sister of the said Mary. They both appear and confess the Matter, upon which a Sentence of Divorce was to pass, whereas in Truth Collet was never married to Anne, but it was a Contrivance between him and his Wife to get themselves divorced, and the Marriage declared void ab Initio, to defeat their Children of an Estate settled upon them in Marriage, with Remainders over, by bastardizing them, after they had been married and lived together 16 Years. The Reason why a Prohibition was prayed, was, because Marriage or no Marriage was to be tried in pais, for that the Inheritance and Freehold of Land were concerned in this Case.

The

The Court directed that they should suggest this Matter, and that it was a Contrivance to obtain a Sentence of Divorce to defeat them of their Estate entailed on them, and then to move for a Prohibition. Curia.

Smallwood *versus* Brickhouse.

THE Suggestion was, That B. being under the Age of sixteen Years had made a Will, and that the Prerogative Court proceeded to the Proof of it; whereas by the Common Law a Person is not capable till 17 Years; and therefore a Prohibition was prayed.

And that the Common Law hath determined the Time, my Lord Coke's Comment upon Littleton was cited, 1 Inst. 89. b. where 'tis said, That at 18 Years of Age he may make his Testament, and constitute Executors; and the Age of a Person is triable also in Pais.

But the Court said, That the Proof of Wills, and the Validity of them, doth belong to the Ecclesiastical Court; and if they adjudge a Person capable, the Court will not intermeddle, for 'tis within their Jurisdiction to adjudge when a Person is of Age to make a Will; and sometimes they allow Wills made by Persons of 14 Years of Age, and the Common Law hath appointed no Time, it depends wholly on the Spiritual Law; and therefore a Prohibition was denied.

Spiritual Courts are proper to determine where a Person is capable of making a Will. Godolph. 276. Curia. T. Jones 210.

Joan Bailies *Case*.

NOTA. One Joan Bayly being in Execution, the Plaintiff died intestate, and the Right of Administration came to her, and a Motion was made for a Habeas Corpus to bring her from the Compter into this Court; for that having administred to her Creditor, she might be discharged; but it was denied, for she could not be thus discharged, because non constat de Persona; neither can she give a Warrant of Attorney to acknowledge Satisfaction, therefore let her renounce the Administration and get it granted to another, and then she may be discharged by a Letter of Attorney from such Administrator.

Administration was committed to the Debtor in Execution.

Anonymus.

Mandamus.

MAndamus to ſwear one who was elected to be One of the Eight Men of Aſhburn Court. It was denied, becauſe it is incertain; for it ought ſpecially to be inſerted what the Office is, and what is the Place of One of the Eight Men of Aſhburn Court, that it may appear to the Court to be ſuch a Place for which a Mandamus doth lie; and though ſuch a Writ hath been granted for One of the approved Men of Guilford, yet it was ſpecially ſet forth what his Office was.

Birch *verſus* Lingen. *Trin.* 34 *Car.* 2. *in B. R.*

Diſcontinuance where amendable.

JUdgment was obtained upon a Bond 25 Years ſince, and in one of the Continuances from one Term to another there was a Blank. The Executors of the Defendant now brought a Writ of Error; and the Plaintiff in the Action got a Rule to amend and inſert the Continuance, ſuggeſting to the Court, that it was a Judgment of a few Terms, and ſo aided by the Statute of 16 & 17 Car. 2. cap. 8.

Hughes Abr. tit. Coſts 480. 2 Sand. 289. Moor 710. Cro. Eliz. 320, 489, 553, 619. Cro. Jac. 211, 353, 528. Stiles 339.

Upon this Rule the Plaintiff fills up the Blank, and the Record was certified, ſo filled up, into the Exchequer-Chamber.

And Mr. Pollexfen moved for the Defendant, that the Record might ſtand as it did at firſt, and that the Rule was got by a Trick and on a falſe Suggeſtion, it being a Judgment before the Reſtoration of this King, and a Diſcontinuance not amendable, for 'tis the Act of the Court; and for an Authority in the Point the Caſe of Friend *and* Baker was cited, where, after a Record certified, a Motion was made to amend it, becauſe Day was given over to the Parties from Eaſter to Michaelmas-Term, and ſo Trinity-Term left out, where by the Opinion of Roll Chief Juſtice, that the giving of a Day more than is neceſſary is no Diſcontinuance; but where a Day is wanting, 'tis otherwiſe.

But Sanders for the Plaintiff ſaid, that this was only a Miſpriſion of the Clerk, and no Diſcontinuance, but amendable: The Clerks commonly leave Blanks in the Venires, and if they neglect to fill them up, 'tis only a Miſpriſion, and amendable by the Court; and the Record being now filled up by the Rule of the Court, ought not to be razed to make an Error.

The

The Chief Justice was of Opinion, That this was not a Discontinuance, but an insufficient Continuance, and an Omission of the Clerk only, who if he had filled up this Blank himself without Rule, it could not afterwards be set aside.

But Justice Jones was of another Opinion, That it was such a Misprision of the Clerk, as was not amendable by the Statute of H. 6. since it was not the same Term, and all the Proceedings being in the Breast of the Court only during the Term, it ought not to be altered, but left in Blank as it was; for where Judgment is entred for the Plaintiff, the Court may, upon just Cause, alter it the same Term for the Defendant, but not of another Term, the whole Term being but one Day in Law: And though the Writ of Error be returned into the Exchequer, that will make no Alteration, for the Record it self remains still here, and 'tis only a Transcript that is removed thither. Sed adjornatur.

Warren *and* Arthur.

TRespals for breaking of his Close. The Defendants plead, That the Place where were, &c. the Lands of one Martin, who made a Lease thereof to the Plaintiff, and did thereby except the Trees growing on the same: In which Lease the Plaintiff did covenant with the said Martin, his Heirs and Assigns, that he and they from Time to Time, during the said Lease, should have Liberty and full Power to fell the said Trees, and root them up, repairing the Hedges where they did grow. That the said Martin granted some of the Trees to the Defendant, by Vertue whereof, he and the rest of his Servants did cut them down, which is the same breaking of the Close of which the Plaintiff complains. To which Plea, Mr. Pollexfen did demur for the Insufficiency, because the Defendant did not shew, that upon cutting down the Trees he did repair the Hedges, as by the Agreement ought to have been done; for this being a limited and qualified Power, ought to be set forth at large; and that it was a Power only annexed to the Reversion, and not assignable to any one else, and so the Defendant hath wholly failed in his Plea; he might have justified under Martin, but not in any of their own Rights.

Power, where 'tis coupled with an Interest, is assignable. T. Jones 205.

But

But the Court were of Opinion, That an Action doth lie in this Case, both against the Lessor and his Assignee, acting under his Power; and they agreed that a bare Power was not assignable; but where 'tis coupled with an Interest, it may be assigned, and here was an Interest annexed to the Power; for the Lessor might sever the Trees from the Reversion. Whereupon Judgment was given for the Defendant.

Scoble *versus* Skelton.

Prescription must be alledg'd with a Seisin in Fee.

THE Plaintiff declared, That he was seised of a Tenement called East, and the Defendant of another Tenement called West Travallock; and that he and all those whose Estate he had, did use to fetch Pot-Water from the Defendant's Close, &c. Issue was taken upon this Prescription, and a Verdict for the Plaintiff; and Mr. Pollexfen moved in Arrest of Judgment, That the Declaration did set forth generally that he was seised, and it did not appear it was in Fee; for if it be for Life only, then the Action doth not lie, because a Prescription cannot be annexed to an Estate for Life.

Tremain insisted, That the Declaration was sufficient, and certain enough, for when the Plaintiff doth alledge that he was seised generally, it shall be intended a Seisin in Fee, especially after Verdict.

But the Court held the Declaration to be defective in Substance, because a Prescription cannot be annexed to any Thing but an Estate in Fee, and therefore 'tis not helped after Verdict. The Judgment was reversed.

Putt *versus* Roster.

A Recovery in Trespass, good Plea in Bar to an Action of Trover. 3 Mod. 1.

TRespass for taking of his Cattle: The Defendant justifies for an Herriot, and upon a Demurrer had Judgment.

The Plaintiff did afterwards bring an Action of Trover and Conversion for the same Cattle, and the Defendant pleaded the former Judgment in Trespass, in Bar to this Action of Trover, and the Plaintiff demurred.

Ser-

Serjeant Maynard argued, That the Plea was not good, because Treſpaſs and Trover are diſtinct Actions, and one may be where the other is not; as, if an Infant give Goods to one, an Action of Trover doth lie to recover them, but Treſpaſs will not: So if Goods be delivered to another, and he refuſe to deliver them upon Demand, Trover, but not Treſpaſs, will lie; and therefore theſe being different Actions, a Recovery in one ſhall be no Bar to the other.

A Formedon brought in the Deſcender, and Judgment thereon, is not pleadable in Bar to a Formedon in Remainder.

There is a great Difference between a Bar to the Action, and to the Right; as where an Adminiſtrator ſues, not knowing that he was made Executor, and Judgment againſt him; and he afterwards proved the Will, and brought an Action as Executor; the former Judgment had againſt him as Adminiſtrator, ſhall not be a Bar to this new Action, becauſe 'tis not a Bar to the Right, for by miſconceiving his Action, the former abated. 5 Co. 33. 6 Co. 37. a. Cro. El. 667. Co Ent. 38. b. 2 Cro. 15 pl. 20. Antea.

But Mr. Holt argued, That theſe were Actions of the ſame Nature, and therefore a Judgment in one was a good Plea in Bar to the other. Treſpaſs or Trover lies for taking or carrying away the Goods of another, and when he hath made his Election which to bring, a Recovery there ſhall be a perpetual Bar to the other.

In an Appeal of Mayhem, the Defendant pleaded a former Recovery in an Action of Aſſault and Battery, and held good; though one is of a higher Nature than the other. 4 Co. 39.

But the Court were of Opinion, That an Action of Trover doth lie where a Treſpaſs doth not, and if the Plaintiff hath miſtaken his Action, that ſhall be no Bar to him. Curia. Roſe *and* Standen, Antea.

As to the Caſe put of the Mayhem, that doth not agree with this, becauſe there can be no Mayhem without an Aſſault, but there may be a Trover without a Treſpaſs; and though the Appeal of Mayhem be of a higher Nature than the Aſſault, becauſe it doth ſuppoſe quod felonice Mayhemiavit, yet the Plaintiff can only recover Damages in both. Rozal *and* Lampen, Antea.

If a Man bring Treſpaſs for the taking of a Horſe, and is barred in that Action, yet if he can get the Horſe in his Poſſeſſion, the Defendant in the Treſpaſs can have no Remedy, becauſe notwithſtanding ſuch Recovery the Property is ſtill in the Plaintiff.

The Defendant in this Caſe hath juſtified the taking of the Cattle for an Herriot, and by the Demurrer the Juſtification is

con-

confeſſed to be true in Fact; now by the taking for a Herriot, the Property of the Goods was altered; and wherever the Property is determined in Treſpaſs, an Action of Trover will never lie for the ſame, but 'tis a good Plea in Bar; and ſo it was adjudged here.

James *verſus* Trollop.

Preſcription for a *Modus* good.

ERror of a Judgment in the Common-Pleas on an Action upon a Prohibition, where the Plaintiff did ſuggeſt, That William late Prior of Norbury in Staffordſhire, was ſeiſed of the ſaid Mannor and of the Tythes thereof ſimul & ſemel, as of a Portion of Tythes, &c.

That the ſaid Prior 25 H. 1. granted the ſaid Mannor and Tythes to William Fitzherbert and his heirs, rendring Rent: That the ſaid Fitzherbert did enter and was ſeiſed, and held it diſcharged of Tythes; that his heirs afterwards granted two Hides of Land, Part of the ſaid Mannor, to S. with the Tythes, at 5 s. Rent; and ſo draws down a Title by Deſcent for 300 Years to F. who being ſeiſed, deviſed the ſame to Dorothy James, (under whom the Plaintiff in the Prohibition claimed) and then concludes, That Fitzherbert and all thoſe whoſe Eſtate, &c. did pay the ſaid Rent to the ſaid Prior, which ſince the Diſſolution was paid to the King and his Aſſigns, in Diſcharge of all Tythes, &c.

The Defendant having craved Oyer of the Deed, demurred to the Suggeſtion; and Judgment was given for the Plaintiff in the Common-Pleas.

And it was now ſaid for the Plaintiff in the Errors, That it doth not appear by the Pleadings, whether the Plaintiff in the Prohibition would diſcharge himſelf by a Preſcription in non decimando, or in Modo decimandi; for the Grant from the Prior being the Foundation of his Title, he could not thereby be diſcharged, becauſe a Deed before Memory cannot be pleaded, unleſs it hath been allowed in a Court of Eyre, or ſome Court of Record ſince Memory; and this Deed being dated in the Reign of King Henry the I. which was 65 Years before the Time of Memory by the Common Law, that beginning in the Reign of Richard the I. whatever is before that Time cannot be tried by Law; if it had been allowed in Eyre, or in ſome of the Courts of Record, it may be pleaded, but no Uſage in pais can confirm it.

1. But

1. But supposing the Deed to be good, the Plaintiff hath alledged a Grant of a Portion of Tythes which he cannot have; for at the Common Law a Lay-man was not capable of Tythes in prender, for no one had Capacity to take or receive them, save only Spiritual Persons: For which Reasons a Lay-man could not prescribe in non decimando, but in modo decimandi he might, because there is still an Annual Recompence in Satisfaction thereof. Jones 369. 2 Co. 49.

2. 'Tis not alledged, That the Place where, &c. was Parcel of the Demesns of the Manor, therefore for what appears it might have been always in Tenancy: And though a Prescription to a Modus by the Lord for himself and all his Tenants, is good, because it might have a lawful Beginning; for the Lands at first might be all in his Hands before it was a Manor, and so much paid for the Tythes thereof; yet such a Prescription by a Tenant is not good. Cro. Eliz. 599.

3. He hath alledged Payment to the Prior, and afterwards to the King, and so would infer a Modus, to which he hath not positively prescribed, but by an old Deed upon Payment of 5 s. to all those whose Estates, &c. And this will not do, for unless the Modus doth go to the Person who by Law ought to have Tythes, or unless it be for his Benefit, 'tis not good; as where it was alledged that he ought to be discharged, because Time out of Memory he employed all the Profits of the Land for the Repairs of the Body of the Church, and to find Necessaries, &c. this was not a good Modus, because 'tis no Recompence for the Parson. 1 Roll. Abr. 649. placito 8.

But it was said by Saunders for the Plaintiff in the Prohibition, That by the Suggestion there was a good Title alledged to be discharged of Tythes; for 'tis set forth, That the Prior had a Portion of Tythes, and the Lands simul & semel, and being a Corporation they might prescribe for Tythes in prender, and the Tythes being well in them, they may well grant it to Fitzherbert paying 5 s. and constant Payment being alledged ever since, 'tis a good Title.

As to the Deed, 'tis true, 'tis dated before the Time of Memory; but yet 'tis pleadable because 'tis a private Deed, and so need not be allowed in Eyre or in Courts of Record; for such as are not to be pleaded unless allowed there, are only Grants of Franchises and Liberties from the King, but the Confession of the Deed to be beyond Memory, and the constant Payment of 5 s. is a sufficient Title to the Plaintiff if the Deed is not pleadable; and if it is, then 'tis a good Discharge that Way.

And as to the Objection, That the Modus is payable to a wrong Person; there are many such which are not paid to the Parson of the Parish, but to Lay-men: But in this Case it doth appear that there was a Modus in the Prior, which being received till it came to the Crown, 'tis good, although now paid to others; so that for that Reason the Spiritual Court ought to be prohibited, and of that Opinion was all the Court; for if a Modus be payable to him who hath the Right of the Tythes, though it be not to the Parson of the Parish, 'tis well enough, especially where the Plaintiff (as here) alledgeth it to be Portio Decimarum belonging to the Prior, so that it cannot be said that the Parson hath not quid pro quo, for he had nothing at first.

This Composition was made with the Prior, and the Plaintiff is only to shew Payment to him, and to those who have his Right.

And as to the Date of the Deed, tis pleadable though Time out of Memory, because 'tis a private Deed; but Grants of Franchises and Liberties must be allowed in Eyre; and so is my Lord Rolls to be understood in his Abridgment: Whereupon Judgment was affirmed.

FINIS.

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